IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Boon v. Mann,*
2015 BCSC 990

Date: 20150610
Docket: S128349
Registry: Vancouver

Between:

Kenneth Boon, Leona Douglas

Plaintiffs

And

Kashmir Mann, Manjit Saini, Gurjit Saini,
Mandeep Sekhon, and Oceanic Plumbing & Heating Ltd.

Defendants

Corrected Judgment: The cover page has been corrected as D. Paperny's name was spelled incorrectly.

Before: The Honourable Mr. Justice Punnett

REASONS FOR JUDGMENT

Counsel for the Plaintiffs:	P.R. Bisbicis
Counsel for the Defendants:	J.R. Loeb D. Paperny, Articled Student
Place and Date of Trial:	Vancouver, B.C. March 16-20, 2015
	Written submissions of the Plaintiffs received April 10, 2015
	Written submissions of the Defendants received April 17, 2015
	Written reply submissions of the Plaintiffs received April 24, 2015
Place and Date of Judgment:	Vancouver, B.C. June 10, 2015

[1] The plaintiffs, Mr. Kenneth Boon and Ms. Leona Douglas, resided as tenants in a residence owned by the defendant Mr. Kashmir Mann in Delta, British Columbia. On July 12, 2011 a fire significantly damaged their unit in the residence and killed one of their pet dogs. The plaintiffs' claim Mr. Mann acted negligently in failing to install smoke alarms and seek damages for loss of property and furnishings, personal injuries, wage loss, as well as future care costs. While they initially raised claims against certain other defendants, those have been discontinued.

Background

[2] In early 2011 the plaintiffs leased a portion of the residence from Mr. Mann, taking possession on April 1, 2011. The parties never signed a tenancy agreement.

[3] On their initial inspection of the property the plaintiffs noted that there were no smoke alarms. They allege the defendant Mr. Mann agreed to have them installed and say they reminded the defendant of the need to do so several times during their tenancy. The plaintiffs say they offered on one occasion to purchase the smoke alarms on Mr. Mann's behalf if the defendant would agree to deduct the cost from their rent. The plaintiffs contend that the defendant then repeated that he would attend to installing the alarms himself, which they allege he never did.

[4] Ms. Douglas' son, Nick Douglas, testified that he had been in the home previously and observed the absence of smoke alarms. Mr. Mann testified that he did not know if the house had smoke detectors when he purchased it in 2007 or 2008 nor did he know if he had installed smoke alarms.

[5] The plaintiffs installed three fire extinguishers in the home, which they testified were tested and functioning at the time of the fire.

[6] In late spring 2011 the plaintiffs reported to the defendant that the dishwasher and refrigerator were not working. The refrigerator was repaired that same day but the plaintiffs were advised that the dishwasher had to be replaced.

[7] On July 12, 2011 Ms. Douglas, her brother-in-law and her sister were at the residence for a barbecue. Mr. Boon joined them upon his arrival home from work in the late afternoon. During the course of the day Ms. Douglas' sister and her husband consumed approximately 12 beers. Ms. Douglas testified that she drank two or three beers and Mr. Boon said he may have had six beers.

[8] At approximately 7:30 p.m. that evening a repairman arrived at the residence to install the new dishwasher. Mr. Boon, who planned to awaken at 2:30 a.m. the next morning for work, retired to bed around that same time. Someone in the household roused Mr. Boon at around 9:00 p.m. to assist the repairman in removing the old dishwasher. Mr. Boon returned to bed shortly thereafter. At 9:30 p.m. the repairman left the residence intending to return the following morning to complete the installation.

[9] Ms. Douglas and the others went to bed later in the evening. There were four dogs in the house at the time, two belonging to the plaintiffs and two belonging to their guests.

[10] At around 11:50 p.m. Ms. Douglas woke up to use the bathroom. She heard what she initially thought to be rain. When she entered the hallway she noticed fire reflected in glass doors leading to another room. She also observed smoke at waist level rolling down the hallway from the kitchen. She continued on to the kitchen, as that was where the dogs were kept, and noticed a hole in the ceiling with flames licking through it and across the ceiling. She screamed for her husband and ran to her sister and brother-in-law's room to wake them up. She had trouble rousing them, having to yank her brother-in-law from the bed by his leg to wake him. He then helped rouse Ms. Douglas' sister.

[11] Ms. Douglas then attempted to call 911 but the phone cut out before she could complete the call. However, a neighbour called 911 at 11:51:01 p.m. and the fire department arrived 7 minutes and 29 seconds after the fire was reported.

[12] All of the occupants escaped from the residence, although Mr. Boon re-entered the home in an attempt to rescue one of the dogs. He suffered some minor burns as a result; the dog perished in the fire.

[13] The plaintiffs did not attempt to use the fire extinguishers as by the time they awakened the fire was too large. Flames destroyed the kitchen of their apartment and part of the building's roof, with smoke and water damage to other areas of the home. The cause and origin of the fire are unknown.

Expert Reports

[14] The plaintiffs did not submit any expert evidence respecting the issue of causation as they agreed with the defendant's submission that the expert report prepared on the plaintiffs' behalf was inadmissible. I agree with that concession.

[15] However, the defendant obtained a rebuttal report to the plaintiffs' report. That report was admitted as a stand-alone report for reasons consistent with those in *Kaigo v. Sawchuk Developments Co. Ltd. et al*, 2014 BCSC 1858.

[16] The defendant's report is that of Sereca Consulting Inc. authored by Christopher J. Reed, MSc. Eng. (Fire), P.Eng. The plaintiffs took no position on the admissibility of the report or Mr. Reed's qualifications. Mr. Reed was qualified as an expert in fire investigation and analysis.

[17] Mr. Reed confirmed that all residential buildings in BC require smoke alarms and commented as well on the purpose of such alarms as follows:

> A smoke alarm combines smoke detection and alarm sounding together in one unit and is used in residential dwellings. The intent is to provide early warning to occupants to allow safe egress. A smoke alarm provides no fire suppression or other notification services. As the intent is for safe egress only and not protection of property, there is no difference in fire spread within an unoccupied dwelling with or without smoke alarms. … [p. 8]
>
> …
>
> … Early detection increases the opportunity for suppression and therefore a properly operating smoke alarm can increase the opportunity to contain the fire. … [p. 4]

[18] He also opined that the effectiveness of a smoke alarm to alert occupants is dependent on the type of alarm, its working condition and the type of fire occurring, that is whether the fire was flaming as opposed to smouldering.

[19] Mr. Reed commented on the issue of whether the spread of the fire could have been contained had smoke alarms been in place. In doing so he provided insight into how complex such a question is:

a) the exact effect of smoke alarms on property loss is difficult to assess;

b) no statistics are available on the frequency in which smoke alarms alerted occupants to a situation that would likely have turned into a fire without a smoke alarm's warning; and

c) despite having smoke alarms in place, 20 years of Surrey, BC fire data suggest that at least 20% if not more of household fires develop outside of the room of origin and cause significant damage.

[20] In discussing whether the presence of smoke alarms would have had an impact on the damage caused by the fire, Mr. Reed opined that several factors contribute to the extent of damage caused by a fire, including:

a) the type of fuel burning;

b) available oxygen and fuel;

c) configuration of the building; and,

d) overall length of time that the fire is burning.

[21] He also stated that in assessing whether or not a smoke alarm would have had an impact on the spread of a fire, it is important to know at what stage the fire was when discovered and its rate of growth. He noted that the rate a fire spread is dependent as well upon a number of factors including:

a) the initial heat source;

b) first fuel ignited;

c) nearby fuel characteristics; and

d) ventilation parameters.

[22] He testified that the extent of fire damage, the absence of physical evidence of a specific fire cause and the lack of detailed witness observations precluded the opportunity to identify the specific cause of the fire. As a result a precise fire growth curve could not be determined. He concluded at p. 6:

> …
>
> … the absence of attempting to suppress the fire, the response time of the Fire Department, and the various rapid fire growth scenarios that are possible suggests that the overall spread of the fire could not have been contained had smoke alarms been in place.
>
> …

[23] Under cross examination Mr. Reed said this:

> Q. Okay. And your evidence as a whole, if I can summarize it, is there were no smoke alarms present potentially, you're not sure about that, but if there -- even if there had been smoke alarms installed, it wouldn't have made any difference in this case; that's been the crux of your evidence?
>
> A. I agree that if or if not, the presence of smoke alarms would not have a bearing on this.
>
> Q. On this file?
>
> A. No.
>
> Q. It wouldn't have changed anything?
>
> A. No.

[24] In his report he opined at pp. 6-7:

> …
>
> It is therefore my opinion that the absence of attempting to suppress the fire, the response time of the Fire Department, and the various rapid fire growth scenarios that are possible suggests that the overall spread of the fire could not have been contained had smoke alarms been in place.
>
> …

> In the situation that the fire was detected in the very early stages (detected by a smoke alarm or other notification), the 911 call and suppression activities would still have allowed at least 7-8 minutes of burning time. As discussed in **Section 4.2** of this report, the various fire growth scenarios possible in the kitchen could have all resulted in a fire transitioning to flashover generating extensive heat and smoke sufficient to cause the damage as observed at the subject building. Even if the kitchen did not reach flashover conditions, the open doorway to the hallway, opening to the attached side room, opening of the exterior door during egress, and observed fuel load within the kitchen would have resulted in smoke and heat exiting the kitchen and significant damage into the remainder of the building.
>
> …
>
> It is my opinion that in this instance, the damage to the Property would not have been lessened had appropriate detection equipment been in place.

[25] It is clear from Mr. Reed's report that there would not have been a lengthy period of time from commencement of the fire to a point where the fire was not capable of being controlled by handheld fire extinguishers. Even if the occupants had been alerted earlier the growth and spread of the fire would still have resulted in full-room involvement.

[26] I note as well that the opinion of Mr. Reed was not challenged in light of the absence of expert evidence to the contrary. As a result there is no expert evidence establishing that the presence of proper smoke alarms would have changed the outcome of the fire in any way, nor any evidence that the plaintiffs would have been alerted to the fire earlier had smoke alarms been present.

Position of the Plaintiffs

[27] The plaintiffs submit that Mr. Mann owed them a duty of care to ensure the residence was reasonably safe for use and specifically that Mr. Mann should have done so by installing smoke alarms. They say that this duty arose both in negligence and pursuant to statute.

Position of the Defendant

[28] The defendant submits that the cause of the fire is unknown and that no fault or negligence can be ascribed to him. Mr. Mann further submits that the plaintiffs have failed to prove on the balance of probabilities that he was negligent and, even if

he was, the plaintiffs have not proved a causal link between his negligence and the losses claimed. With respect to the claim under statute he submits that breach of a statute does not automatically impose liability given the breach must relate to and be the probable cause of the damage claimed.

Law and Analysis

[29] As noted the plaintiffs advance their claim in negligence and breach of statute. They rely on the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, the *Residential Tenancy Act*, S.B.C. 2002, c. 78 and the *British Columbia Fire Code,* B.C. Reg. 175/2006.

[30] The relevant portions of the *Occupiers Liability Act* are:

> **3** (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises,
>
> (b) activities on the premises, or
>
> (c) conduct of third parties on the premises.
>
> …
>
> (4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on the person because of an enactment or rule of law imposing special standards of care on particular classes of person.
>
> …
>
> **6** (1) If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.
>
> …
>
> (3) For the purposes of this section

(a) a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,

(b) nothing relieves a landlord of a duty the landlord may have apart from this section, and

(c) obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.

(4) This section applies to all tenancies.

[31] The salient *Residential Tenancy Act* provisions are:

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

...

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4) A tenant is not required to make repairs for reasonable wear and tear.

(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

[32] The plaintiffs allege that the defendant landlord owed them a duty of care under the *Occupiers Liability Act* and the *Residential Tenancy Act,* specifically that the defendant had a duty to ensure that the residence had smoke alarms pursuant to

ss. 3 and 6 of the *Occupiers Liability Act* as well as s. 32 of the *Residential Tenancy Act*. Further, the plaintiffs say that the *Occupiers Liability Act* obliged the defendant to inspect the premises for defects.

[33] The plaintiffs also argue that s. 7(1) of the *Residential Tenancy Act* means that the defendant must compensate the plaintiffs for all damages and loss resulting from his failure to comply with s. 32(1). They submit as well that under s. 6(1) of the *Occupiers Liability Act* the defendant owed the same duty of care to the plaintiffs and on the rented premises as would be owed by an occupier under the *Occupiers Liability Act*. As a result they say the defendant had a duty of care, but he took no such care. Regarding the *British Columbia Fire Code,* the plaintiffs point to B.C. Reg. 44/2010 which amended Article 2.1.3.3 of the *Fire Code* to stipulate that smoke alarms must be installed in all dwelling units in the province.

[34] The defendant does not dispute that he had a duty of care under these statutes to ensure that the residence was reasonably safe and complied with safety and housing standards. He also concedes that the *Fire Code* requires smoke alarms in residential buildings. That, however, is not the end of the analysis. While the landlord breached certain statutory requirements, that in and of itself does not give rise to a right of action because the plaintiffs must also prove that Mr. Mann's negligence caused the damages complained of (*Bueckert v. Mattison* (1996), 149 Sask.R. 81 (Q.B.), at paras. 54-56).

[35] In *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 206, Dickson J. for the Court described this issue as follows:

> …
>
> This case raises the difficult issue of the relation of a breach of a statutory duty to a civil cause of action. Where "A" has breached a statutory duty causing injury to "B", does "B" have a civil cause of action against "A"? If so, is "A's" liability absolute, in the sense that it exists independently of fault, or is "A" free from liability if the failure to perform the duty is through no fault of his? …

[36] He then concluded at 227-228:

…

1. Civil consequences of breach of statute should be subsumed in the law of negligence.
2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.
3. Proof of statutory breach, causative of damages, may be evidence of negligence.
4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.
5. In the case at bar negligence is neither pleaded nor proven. The action must fail.

…

[37] That said, the *Residential Tenancy Act* imposes a duty on the landlord to provide premises that comply with standards set by law. As held in *Tolea v. Ialungo*, 2008 BCSC 395, a "breach of the building code may indicate that such standards have not been complied with, and thereby give rise to a civil action in tort," (para. 63), citing *Zavaglia v. MAQ Holdings Ltd.* (1986), 6 B.C.L.R. (2d) 286 (C.A.)).

[38] The plaintiffs acknowledge that cases such as *Tolea*, *Zavaglia* and *O'Leary v. Rupert,* 2010 BCSC 240, state that the *Residential Tenancy Act* does not create a claim for breach of statutory duty or itself give rise to an action in tort. They also concede that the *Residential Tenancy Act* imposes no higher duty of care than that contemplated by the law of negligence. However, they submit that those cases applied earlier versions of the *Residential Tenancy Act* that lacked a provision equivalent to what is now s. 7, and say that none of these decisions refer to such a provision as s. 7. They submit therefore that such authorities can no longer be relied upon as authority for the proposition that there can be no direct claim for damages under the *Residential Tenancy Act*.

[39] The plaintiffs further submit that, by the plain wording of s. 7, in order to give rise to a right of compensation under s. 7 it is sufficient if the plaintiff's damage or loss "resulted" from the landlord's non-compliance with the *Residential Tenancy Act.*

They argue it is not necessary for the plaintiff to show that the damage or loss resulted from the landlord's failure to take reasonable care for the plaintiff's safety. Nor, they say, under s. 3(4) of the *Occupiers Liability Act,* is the application of this higher standard to a landlord precluded by the fact that there may also be liability under the *Occupiers Liability Act.*

[40] The plaintiffs' assertion that s. 7 of the *Residential Tenancy Act* has been amended and that therefore *Tolea*, *Zavaglia* and *O'Leary* cannot be relied upon is not supportable. The predecessor to the current *Residential Tenancy Act* was enacted in 1984 and amended in 1993, with a new version enacted in 1996. Each of these statutes contains a provision analogous or substantially similar to s. 7 of the present *Residential Tenancy Act,* which came into force on January 1, 2004. That version of the legislation was applied in *O'Leary* with the older statutes applicable in *Tolea* and *Zavaglia*.

[41] The prior versions of what is now s. 7 of the *Residential Tenancy Act* are somewhat narrower than the provision in its present form, but not in a manner relevant to the disposition of the case at bar. The older versions apply only to a breach of the *Residential Tenancy Act* as opposed to a breach of the *Residential Tenancy Act*, the regulations or a tenancy agreement. The 1984 statute stated:

> **48.** …
>
> (4) A landlord or tenant who, being a party to a tenancy agreement, contravenes this Act is liable to compensate the other party to the tenancy agreement for loss suffered by him as a result of the contravention.
>
> (5) Where a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement or this Act, the landlord or tenant entitled to claim damages has a duty to mitigate his damages.
>
> [Emphasis added]
>
> …

[42] And the similarly, from the 1996 legislation:

> **80** …

> (4) If a landlord or tenant who is a party to a tenancy agreement contravenes this Act, he or she is liable to compensate the other party to the tenancy agreement for loss suffered by the other party as a result of the contravention.
>
> (5) If a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement or this Act, the landlord or tenant entitled to claim damages has a duty to mitigate his or her damages.
>
> [Emphasis added]
>
> …

[43] I fail to see how s. 7 of the current *Residential Tenancy Act* somehow departs from the requirement that the damage or loss must result from the breach of the statute. Section 7(1) provides that the landlord "must compensate … for damage or loss that results" [emphasis added]. It is incumbent on a plaintiff to prove causation on the balance of probabilities. There is nothing in s. 7 that relieves a plaintiff of that obligation. It does not state that merely breaching the *Residential Tenancy Act* gives rise to damages. The fact that the authorities referred to did not directly reference s. 7 or its predecessors does not affect the application of the law. As a result I conclude that the cases sought to be distinguished apply.

[44] The plaintiffs further submit that a number of authorities have held that the failure to install smoke alarms in residential premises constitutes either negligence or a breach of the *Occupiers Liability Act* referring to *Bueckert*, as well as *Daniels v. McKelvery*, 2010 MBQB 18, at para. 21 and *Leslie v. S & B Apartment Holding Ltd.*, 2011 NSSC 48, at paras. 34-38. While these cases do stand for that proposition, they also clearly state that a failure to install smoke alarms alone does not entitle a plaintiff to damages, without proof of causation.

[45] In *Bueckert* the plaintiff fell asleep in the rental accommodation of an acquaintance. The apartment caught fire and she suffered severe burns to her arm and hand. She had no memory of the fire or how she was injured. There was a statutory requirement that smoke alarms be installed and the landlord was found negligent for failing to do so. However the Court was not persuaded on a balance of probabilities that there was "a causal connection between that negligence and the

injury sustained" (para. 56). The Court found that the plaintiff had awakened before she incurred any injury, and as a smoke alarm would have achieved nothing more than that, its absence played no role in the injuries she suffered (paras. 58-59).

[46] In *Daniels,* a 14-year-old boy died in a fire at the defendant's home. It was alleged that the defendants were negligent for failing to have working smoke alarms in the house. It was not disputed that under the applicable occupier's liability legislation the defendants owed a duty of care. The Court noted however that the plaintiffs had to establish firstly that the defendants' breached the duty of care, and secondly that the breach contributed to the death of the child. The Court accepted that the risk of fire was a reasonably foreseeable event. However, the evidence showed that the injuries incurred would have arisen regardless of the actions of the defendants, so that causation could not be proven (paras. 42-43).

[47] In *Leslie* the plaintiffs awakened in their apartment to find it full of smoke, although no alarms were sounding. They suffered injury jumping from a window to escape. The landlord conceded he had a duty of care but denied breaching the standard of care and argued that the damages suffered were not due to any act or omission on his part. The Court found that the smoke detectors, when working, were sensitive to smoke and that failure of the alarms to sound allowed time for the smoke and fire to progress to the degree that it did before being detected by the plaintiffs. Thus, if the alarms had sounded the tenants would have been alerted earlier. That fact, in combination with evidence that the fire alarm was pulled by another tenant but did not work and evidence that the fire doors in the building were not functioning, was held to be sufficient to found causation in that case (paras. 45-46).

[48] I consider as well the various cases referred to me by counsel for Mr. Mann. In *Ratt (Litigation Guardian of) v. Wolfe* (1994), 126 Sask.R. 195 (Q.B.), the infant plaintiffs claimed damages for smoke inhalation-related injuries they suffered during a fire in a home owned by the defendant landlord. The Court found that the defendant had failed to ensure that smoke alarms had been installed in the home. The plaintiffs in that case submitted that "if the defendants had installed the requisite

smoke alarms, they would have awakened in time to escape uninjured," a position which the Court dismissed as "too simplistic" (para. 26). The Court held that while the infant plaintiffs had suffered extensive injury in the fire, and the defendant landlord had been negligent by failing to install proper smoke alarms in the house, the plaintiffs had not established that the absence of smoke alarms in the home had caused their injuries, at 227-228:

> …
>
> Causation must be proved on the balance of probabilities. It is not sufficient to show that the damage was possibly caused by the defendant's breach of the statutory duty in not having smoke alarms on the premises at the time of the fire. …
>
> On the facts I find that the absence of fire alarms at the time of the fire was not the cause of the plaintiffs' injuries or losses.
>
> …

[49] In *AXA Insurance (Canada) v. Brunetti* (1998), 80 A.C.W.S. (3d) 225 (Ont. C.J. (G.D.)) ("*AXA*"), the defendant landlords were accused of negligence in causing fire damage to a neighboring home insured by the plaintiff. The plaintiff alleged that, among other acts of negligence, the defendants had been negligent in failing to install smoke alarms in the home. The Court ruled that while the defendants had violated several city bylaws, this negligence was not causally linked to the damage caused by the fire. Thus no liability was found. Sutherland, J. outlined the test for determining liability in a case such as this:

> **98** Given that there was a duty to provide and maintain a functioning smoke detector in the basement apartment, for the Gills to be liable to the plaintiff in respect of the smoke detector, it would be necessary for the plaintiff to establish
>
> (a) that the landlord was negligent with respect to the smoke detector (for example, by failing to supply it or by failing to inspect it on a regular basis);
>
> (b) that the smoke detector did not function properly on the night in question; and
>
> (c) the malfunction of the smoke detector allowed the fire to spread.
>
> On the facts there was a properly placed smoke detector; the landlord failed to inspect it regularly; and, the detector functioned properly on the night in question. With respect to the last element, it is not clear that the functioning

> or non-functioning of the smoke detector would have made much difference in the matter of the spreading of the fire. The fire was one of violent "flash over" and it is unlikely that the functioning or non-functioning of the smoke detector would have had any impact in terms of the ability to prevent the spread of the fire. Its functioning was clearly more relevant in terms of getting the occupants out of the building.
>
> **99** I conclude that the plaintiff has not proved that negligence of the defendant Gills caused or contributed to the fire loss at the adjoining premises and, accordingly, that the plaintiff's action against them is to be dismissed, with costs to the Gill defendants.

[50] The Court cited *AXA* in *Lippa v. Zarrello,* [2004] O.J. No. 4254 (S.C.J.), dismissing the plaintiff's claim in negligence on the basis of that authority:

> **24** The view that a statutory breach gives rise to damages upon mere proof of a breach cannot be accepted. If proof is adduced that the statutory breach caused the damages then such breach may provide evidence of negligence.
>
> …
>
> **29** As discussed in *AXA Insurance (Canada) v Brunetti* ... a malfunctioning smoke alarm can impose liability. In order to establish that the defendants' were negligent with respect to the smoke detector the plaintiff needs to prove that the defendants failed to inspect the smoke detectors on a regular basis; that the smoke detectors did not function properly on March 9, 2002; and that the malfunction of the smoke detectors allowed the fire to spread. ...
>
> **30** ... There was no clear evidence before me with respect to when the fire started, and as to whether the triggering of the smoke detector would have made a difference. I conclude that the plaintiff has not established that negligence of the defendants caused or contributed to the fire loss in his apartment.

[51] I also take guidance from the decision in *Trans North Turbo Air Ltd. v. North 60 Petro Ltd*., 2003 YKSC 18, aff'd 2004 YKCA 9. There, the Court had to determine whether the plaintiffs were contributorily negligent for damages caused by a fire that occurred in an airplane hangar owned by the plaintiffs. The plaintiffs alleged that employees of the defendant negligently caused the fire through improper use of an oxyacetylene torch. The defendant took the position that the plaintiffs' failure to install proper smoke alarms in the hangar contributed to the damages. In finding that the defendants had not proved causation with respect to their contributory negligence allegation, the Court held that there was no evidence establishing that

the presence of a working smoke alarm would have limited the fire damage or changed the outcome of the fire.

[52] Returning to the present facts, Mr. Mann gave evidence that he could not be sure whether or not any smoke detectors were installed. The expert report of Mr. Reed states no smoke alarms were noted by him during his examination of the premises, although the extent of the fire damage and collapsed debris may have caused these to escape his notice. I conclude however, that on the balance of probabilities, no smoke alarms were installed.

[53] There is no evidence that the defendant did not conduct safety inspections of the residence nor was he asked if whether he had done so.

[54] I am of the view that the applicable law is that articulated in *AXA* placing the onus on the plaintiffs to establish on the balance of probabilities that:

a) the defendant was negligent with respect to the installation, inspection, upkeep, or other matter relating to the smoke alarm;

b) the smoke alarm was not present or was not functioning properly at the time of the fire in question; and

c) the malfunction of the smoke alarm, or its non-existence, was causally linked to the spread of the fire and the damage caused by the fire.

[55] It is insufficient for the plaintiffs to simply allege that firefighting crews or any other persons may have been alerted to the fire's presence earlier than they were had there been smoke alarms installed without providing evidence to establish this.

[56] I am satisfied that the defendant was negligent in not installing and maintaining smoke alarms. However the plaintiffs have failed on the balance of probabilities to establish that negligence caused the losses claimed. The evidence of the plaintiffs failed to address the issue of when the smoke alarms, if present, would have alerted the inhabitants to the fire. There is no evidence of when the fire started, the length of time it had been burning before being discovered when Ms. Douglas

awoke in relation to the fire's stage of growth and no evidence other than mere conjecture that the presence of smoke alarms would have awakened Ms. Douglas or the other occupants of the premises earlier.

[57] There is simply no basis upon which to conclude that had smoke alarms been present the fire would have been capable of extinguishment by them or the fire department in sufficient time to prevent any loss. To reach that conclusion would be speculative at best. The plaintiffs have failed, on the balance of probabilities, to establish that the defendant's negligence was causally linked to the losses claimed.

[58] As a result I need not address the issue of damages. I dismiss the plaintiffs' claim for want of proof of causation.

Costs

[59] While defendant's counsel provided written submission on costs as part of their general submissions, plaintiffs' counsel seeks leave to address costs. As a result the parties are at liberty to file written submissions as to costs on a schedule to be arranged between them. That schedule is to be provided to the Court within 14 days of the release of these reasons.

"Punnett J."