COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Boon v. Mann,*
2016 BCCA 242

Date: 20160608
Docket: CA42873

Between:

Kenneth Boon and Leona Douglas

Appellants
(Plaintiffs)

And

Kashmir Mann

Respondent
(Defendant)

Before: The Honourable Madam Justice Garson
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated June 10, 2015 (*Boon v. Mann*, 2015 BCSC 990, Vancouver Docket S128349).

Reasons for Judgment

Counsel for the Appellants:	M. McCubbin P.R. Bisbicis
Counsel for the Respondent:	J. Loeb
Place and Date of Hearing:	Vancouver, British Columbia May 12, 2016
Place and Date of Judgment:	Vancouver, British Columbia June 8, 2016

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Fitch

Summary:

The appellants appeal the dismissal of their negligence claim for property loss and personal injury resulting from a fire. The appellants rented a suite from the respondent, who failed to install smoke alarms. The trial judge held that the appellants failed to prove that if smoke alarms had been installed, their losses would have been lessened or averted. They submit that the judge applied the wrong legal test for causation and that he misapprehended evidence or misapplied the causation test in concluding that the absence of smoke alarms did not cause their personal and psychological injuries, as distinct from property loss. Held: The appeal is dismissed. The judge applied the correct causation test. There was no basis for a relaxed standard absent any evidence connecting the respondent's negligence with the loss. The judge did not misapply the causation test or misapprehend evidence. There was no evidence that the presence of smoke alarms would have allowed the appellants to escape the fire earlier or otherwise lessened their injuries.

Introduction

[1] On July 12, 2011, a fire occurred in the suite that the appellants, Kenneth Boon and Leona Douglas, rented from the respondent, Kashmir Mann. The appellants lost property in the fire. Mr. Boon sustained some moderate physical injuries in his attempt to rescue their dogs, and both appellants allege psychological injury caused by the frightening escape from the fire. They brought the within action against the respondent, alleging that their losses and injuries were caused by his negligent failure to install smoke detectors.

[2] The trial judge dismissed their claim: *Boon v. Mann*, 2015 BCSC 990. Although he was satisfied the respondent was negligent in failing to install the smoke alarms, he held that the appellants had failed on a balance of probabilities to establish that the respondent's negligence caused the losses claimed.

[3] The appellants submit that the trial judge erred by applying too narrow a causation test. They contend that the judge misapprehended the evidence by failing to distinguish between the causal roles played by the absence of smoke alarms and the appellants' physical and psychological damages as distinct from their property loss.

[4] For the reasons that follow, I would dismiss the appeal.

Background

[5] The appellants rented a suite in a home owned by the respondent in Delta, British Columbia. During their move-in inspection, they observed the absence of smoke alarms and asked the respondent to install them. He never did. Late in the evening of July 12, 2011, Ms. Douglas woke up to use the washroom and discovered a fire. Although the appellants and their guests were able to escape the fire, they lost their personal belongings, several dogs, and sustained minor physical injuries associated with trying to rescue the dogs. They also assert that they suffered psychological injury from the frightening events of that evening.

[6] A professional engineer, Mr. Christopher Reed, MSc. Eng. (Fire), P. Eng., an expert in fire investigation and analysis, was the only expert who testified at trial. His report was filed as an exhibit, and he was cross-examined. Mr. Reed concluded that "the spread of the fire could not have been contained had a working smoke alarm been in place" and that "the damage to the property would not have been lessened had a working smoke alarm been in place". Under cross-examination, he testified that he did not know whether the presence of a smoke alarm would have permitted the occupants of the building to escape earlier.

[7] The trial judge concluded that the evidence was insufficient to prove that the fire would have been capable of extinguishment, had the smoke detectors been installed (at paras. 56-57):

> 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.
>
> 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.

Issues

[8] The appellants frame their appeal around the following two issues:

a) Did the trial judge err in applying the incorrect legal standard of causation?

b) Did the trial judge err in misapprehending the evidence regarding the causal role that the absence of smoke alarms played in the appellants' personal and psychological injuries as distinct from their property loss?

[9] At the hearing of the appeal, the appellants withdrew their appeal of the dismissal of their property damage claim, preferring to focus on the dismissal of the claims of personal and psychological injury as well as the loss of the dogs.

Discussion

Did the judge apply the incorrect legal standard of causation?

[10] The appellants rely on *Snell v. Farrell*, [1990] 2 S.C.R. 311 for the proposition that a narrow, traditional approach to causation is inappropriate, and that courts should approach causation in a robust, ordinary, common-sense manner. They submit that the trial judge approached causation too narrowly. They contend that this issue is to be evaluated on a standard of correctness.

[11] Citing *Athey v. Leonati*, [1996] 3 S.C.R. 458, *Resurfice Corp. v. Hanke*, 2007 SCC 7, and *Clements v. Clements*, 2012 SCC 32, the appellants argue that the trial judge did not require expert evidence or scientific precision to conclude that the fire Ms. Douglas found had started well before she discovered it, and that such a fire would have probably created enough smoke to set off a typical smoke alarm. In *Snell*, which concerned an allegedly negligent operation, the following passages appear at 330:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced...

> It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties, whereas a lesser standard is demanded by the law.

[12] The appellants say that on a common sense application of the causation test, as described in *Snell*, the judge should have concluded that, had there been smoke alarms, they would have awoken earlier, and their losses would have been lessened (if not eliminated). They say that such conclusions flow naturally from the facts. They point out that the fire in this case grew big enough to burn a hole in the appellants' kitchen ceiling. They say that given the advanced state of the fire at the time Ms. Douglas found it, the only reasonable conclusion is that it must have been burning for some time. They say that in that time, smoke would have built up and set off the smoke alarms. They therefore submit that the building's occupants would have been alerted to the fire, at least before the hallways filled with smoke, and that they would have been able to exit the building safely and in an orderly manner.

[13] The respondent asserts that what the appellants actually object to is the trial judge's application of the causation test to the facts, rather than the correctness of the causation test itself. Accordingly, the respondent asserts that the decision on causation is a question of mixed fact and law, to be evaluated on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 27-29; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[14] The respondent submits that *Snell* affirms that the onus of proving causation rests with the plaintiff. As to whether causation can be inferred in the absence of precise scientific evidence, they distinguish *Snell* on its facts. In *Snell*, the respondent suffered an injury to his optic nerve. Expert medical evidence could not definitively determine that the damage caused to the optic nerve was the result of surgery or natural causes. However, the judge made a number of findings virtually ruling out natural causes, and there was at least some evidence upon which a finding of causation could be grounded. By contrast, in this case, the respondent

notes that the trial judge found that there was no evidence supporting a finding of causation.

[15] I understand the appellants to contend first that the judge applied the wrong legal test for causation. A correctness standard of review applies to this issue. Second, they say the judge misapprehended the evidence and misapplied the test. This is a question of mixed fact and law, subject to a deferential standard of review: *Housen* at para. 28. I address the second question later in these reasons.

[16] As a general rule, a plaintiff in a negligence action cannot succeed unless he shows as a matter of fact he would not have suffered the loss "but for" the defendant's negligent act. As noted, the appellants say that a trial judge should take a robust, pragmatic approach to determining causation, and that "scientific proof" is not always required: *Clements* at para. 46.

[17] Both *Snell* and *Clements* underscore the importance of establishing a substantial connection between the injury in question and the defendant's negligence. Summarizing *Snell*, the Court in *Clements* said the following (at para. 21):

> …The usual requirement of proof of "but for" causation should not be relaxed where the result would be to permit plaintiffs to recover in the absence of evidence connecting the defendant's fault to the plaintiff's injury. …

[18] The trial judge held that the appellants were required to show that "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" (at para. 54, emphasis added).

[19] I do not agree with the appellants that, in the circumstances of this case, the judge ought to have relaxed the causation test so as to permit a "common sense" analysis of the issue.

[20] In this case, there was no evidence as to the precise cause of the fire. There was no evidence as to whether the fire would have produced smoke sufficient to have activated the fire alarm, but not sufficient to create an active fire within the time frame that would have permitted fire suppression from the small fire extinguishers

available for use, or within the seven minutes that it took the fire department to arrive. The trial judge found that the absence of evidence on these points was fatal to the appellants' claim. In my view, he did not err in his articulation of the "but for" test. As the Court stated in *Clements*, "but for" causation should not be relaxed where to do so would allow for recovery in the absence of evidence creating a nexus between the injury and the loss.

[21] I would not accede to the first ground of appeal.

[22] I consider next whether the judge erred in his application of the "but for" test.

Did the judge misapprehend the evidence or misapply the causation test?

[23] The appellants submit that the judge erred in concluding that they had failed to establish that the absence of smoke alarms played no role in their personal and psychological injuries. They contend that the trial judge failed to distinguish between the argument that the smoke alarms would have allowed the occupants or the fire department to suppress the fire before catastrophic damage occurred from the argument that an early warning would at least have prevented their psychological and physical injuries. They submit that their personal injuries were distinct from their property loss claim from a causation perspective.

[24] The appellants say that symptoms of post-traumatic stress disorder (alleged by Ms. Douglas) are highly specific, and that they developed because of the close call they had in escaping the fire. It follows, they say, that had the fire been discovered at an earlier stage, they would not have had such a frightening escape, and Ms. Douglas would not have developed symptoms. They submit common sense dictates that an operating smoke alarm would have alerted them to the presence of smoke before the fire was fully developed.

[25] The respondent says that the appellants' evidence was not sufficient to overcome the expert evidence that it could not be determined whether a smoke detector would have successfully alerted the appellants to the fire at the smoke-only

stage. The respondent says that the appellants bore the burden of proving that: (i) the smoke alarm would probably have sounded; (ii) it probably would have alerted the sleeping occupants; and (iii) they would probably have escaped at the smoke-only stage.

[26] The respondent says it is speculative to reach any conclusions as to how the fire would have developed, or the time in which it would have reached the flashover stage. Ms. Douglas testified that it was exceedingly difficult to wake the occupants, despite her screaming and banging doors. As the respondent put it, it is not really a question of whether the occupants would have heard the smoke alarm, but rather what size the fire would have been when they were alerted. The respondent says there is an absence of evidence on this point.

[27] In Mr. Reed's written report (unchallenged by the appellants), he opined as follows:

> Flashover represents a transition in fire development from a condition where the fire is dominated by burning of the first item ignited (combustible materials within the kitchen) to a condition where the fire is dominated by burning of all items in the compartment (entire kitchen). This transition is generally characterized as the transition from a "fire in a room" to a "room on fire". …
>
> Flashover times of 3 to 5 minutes are not unusual in residential room fire tests and even shorter times to flashover have been observed in non-accelerated room fires. Room fire tests of similar size to the kitchen conducted at Sereca Fire Consulting have reached flashover in as little as seven minutes and as long as 15 minutes.
>
> …Therefore, the literature timeframes and our office testing would suggest that the approximate intervention time of 10-15 would provide sufficient time for a fire to develop and spread from the room of origin, regardless of the stage of the fire at the time of first being notified.

[28] Under cross-examination Mr. Reed was asked if the occupants of the house would have been able to "get out sooner… than they did… with a smoke alarm". He testified, "I don't know." He also stated that flashover could develop in as little as one to three minutes:

> When flashover occurs or the state of that, typical observations are fire venting from all the openings of that compartment. The items in the room from the floor to the ceiling will be ignited and burning. This flashover scenario or stated development has been measured in various live burn tests

> to understand how long it would take for a fire to develop to this point. Literature, as I've referenced here, literature has identified that a flashover condition in a typical room or a single compartment can develop in as early as one to three minutes.

[29] The appellants' argument rests on the assertion that the cause of their physical and psychological injuries was the failure of the smoke alarms to provide an early warning. However, to repeat, the judge explicitly found as follows (at para. 26 and 56):

> 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.
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> …
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> 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.

[30] In other words, the judge found that there was no evidence beyond "mere conjecture" that an early warning would have prevented the injuries in question.

[31] The trial judge's application of the causation test to the facts is entitled to deference. I have already said that the judge did not err in his articulation of the test for causation, and the appellants have not identified any misapprehension of the evidence. Mr. Reed testified that flashover could occur in minutes. There was evidence that the occupants of the house were difficult to rouse. There was no evidence as to the cause of the fire or the exact location of its origin, and importantly, no opinion evidence that a smoke alarm would probably have woken the occupants and allowed them to escape before the fire progressed beyond the smoke stage.

[32] I am satisfied that there was no misapprehension of evidence, and that the judge did not apply the causation test to the evidence improperly.

Disposition

[33] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Mr. Justice Fitch"