

COURT OF APPEAL FOR ONTARIO

CITATION: Bonello v. Gores Landing Marina (1986) Limited, 2019 ONCA 127
DATE: 20190220
DOCKET: C65271

Brown, Paciocco and Zarnett JJ.A.

BETWEEN

Timothy Bonello, Ted Bonello, Anne Cutajar Wagner, Andrew Bonello and Mark Bonello

Plaintiffs

and

Gores Landing Marina (1986) Limited, Joseph Davies and Murray E. Carslake
and Joseph Davies Jr. also known as Joey Davies

Defendants (Appellants)

and

Chris Kane, Chris Ryan, Anthony Cook, Gabe Mansueto, Gerald Chestnut, Jeff Jaglel, Frank Buttigieg, Dan Rule and Mike Buttigieg

Third Parties (Respondents)

R. Steven Baldwin, for the appellants, Gores Landing Marina (1986) Limited and Joseph Davies

Nadine Nasr, for the respondent Gerald Chestnut

Nestor Kostyniuk and Jeffrey Pasternak, for the respondents Frank Buttigieg and Mike Buttigieg

Lianne Sharvit, for the respondent Jeff Jaglel

A. C. Gluek, for the respondent Gabe Mansueto

Russell Tilden, for the respondent Anthony Cook

Heard: January 17, 2019

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated April 6, 2018, with reasons reported at 2018 ONSC 2237.

BROWN J.A.:

I. OVERVIEW

[1] In August 2007, the plaintiff, Timothy Bonello, was seriously injured during a recreational game of tug-of-war at a campground operated by the appellant, Gores Landing Marina (1986) Limited, of which the appellant, Joseph Davies Sr., is a principal. The rope used during the game contained several loops. Mr. Bonello put his left arm through a loop. There were about 20 adult males on each side of the rope. When the pull started, the loop tightened on Mr. Bonello's arm. The resulting injury was so severe that his left forearm ultimately was amputated.

[2] In 2009, Mr. Bonello commenced an action against Gores Landing and its two owners, Mr. Davies Sr. and Murray Carslake. The action was dismissed against the latter in 2012. Following examinations for discovery, Mr. Bonello amended his claim to add as a defendant Joseph Davies Jr., the son of Mr. Davies Sr.

[3] In his Amended Statement of Claim, Mr. Bonello advances two types of claims against Gores Landing, Joseph Davies, Sr. and his son, Joseph Davies,

Jr. First, he pleads that the defendants breached their duties under the *Occupiers' Liability Act*, R.S.O. 1990. c. O.2, to ensure that their premises, and the activities carried on there, were reasonably safe. Second, he alleges the defendants were negligent. The particulars of the negligence pleaded against Mr. Davies Jr. include that: he obtained the rope for the tug-of-war; knew loops in the rope posed a hazard to participants; failed to ensure the loop did not pose a danger to participants; failed to warn Mr. Bonello not to place his hand in a loop; and failed to supervise properly Mr. Bonello's participation in the activity.

[4] Mr. Bonello did not sue any of the other participants in the tug-of-war game. However, in 2010 the defendants initiated a Third Party Claim against the respondent third parties, all of whom participated in the tug-of-war.

[5] In 2016, the appellant defendants moved for summary judgment to dismiss Mr. Bonello's action. The third parties moved for summary judgment dismissing the Third Party Claim; those motions were held in abeyance until the disposition of the appellants' motion to dismiss the main action. By order dated August 25, 2016, Perell J. dismissed the action: 2016 ONSC 5372. This court set aside his order on the ground that consideration was not given to Mr. Bonello's claim in negligence. As a result, there was a genuine issue requiring a trial as to whether the defendants were vicariously liable for any negligence on the part of Mr. Davies Jr.: 2017 ONCA 632.

[6] Another round of summary judgment motions ensued in early 2018. The appellants moved again for summary judgment dismissing the action. The motion judge dismissed their motion: 2018 ONSC 2211. Based on his interpretation of this court's 2017 decision, the motion judge concluded the defendants were precluded by operation of the doctrine of issue estoppel from moving a second time for summary judgment: at para. 10. Although I have serious reservations about that interpretation, it is of no consequence to the issues on this appeal. No appeal was taken from that decision

[7] The third parties' motions for summary judgement were heard at the same time. The motion judge granted them, dismissing the Third Party Claim: 2018 ONSC 2237. The appellants appeal.

[8] The appeal was dismissed following oral argument, with reasons to follow. These are those reasons.

II. FACTS

[9] Gores Landing operates a campground and marina on Rice Lake where it rents cottages, sites for vacation trailers, and boat slips. In 2007, renters at the campground held a "Jimmy Buffet Day". Several of them organized the culminating event – a tug-of-war pitting the cottagers against the trailer renters. Those organizers went around the grounds inviting adult males to join one of the

teams. Ultimately about 20 cottagers squared off against an equal number of trailer renters.

[10] At the time, Mr. Davies Jr. was at the site. The tug-of-war organizers asked him for a rope. He obtained one from a shed on the property and made it available for use in the game.

[11] The rope had several loops in it. Some of the participants in the event tried to untie the loops. They succeeded in removing some; a few remained.

[12] Mr. Bonello joined one of the teams. He placed his arm in one of the loops, which tightened, resulting in the injury once the teams started pulling the rope.

[13] The key facts about the third parties' involvement in the game are not in dispute:

- (i) None of the third parties organized the game;
- (ii) None of them provided the rope used for the game;
- (iii) Four of the participant third parties saw loops in the rope before the game started: Gerald Chestnut, Frank Buttigieg, Mike Buttigieg, and Jeff Jaglel;
- (iv) Two of them attempted to remove or untie some of the loops: Gerald Chestnut and Frank Buttigieg;

- (v) Two did not see any loops in the rope or attempt to remove them; they simply picked up the rope and pulled when the signal was given: Anthony Cook and Gabe Mansueto; and
- (vi) One of them warned Mr. Bonello not to put his hands in the loops: Mike Buttigieg. Mr. Bonello testified that he did not recall any such warning.

III. FIRST GROUND OF APPEAL

[14] As their first ground of appeal, the appellants submit that the motion judge failed to recognize that in its 2017 reasons this court implicitly accepted that Mr. Davies Jr. owed a duty of care to Mr. Bonello. According to the appellants, the only issue this court left for trial was whether Mr. Davies Jr. had breached the standard of care for that duty. Since the acts or omissions of the third parties were similar to those of Mr. Davies Jr., it follows, according to the appellants, that the third parties owed a duty of care to Mr. Bonello. The motion judge erred in departing from that implied holding of this court.

[15] No such holding, implicit or otherwise, is apparent in this court's 2017 decision. There, this court held, at paras. 37 to 39, that a genuine issue requiring a trial existed as to whether Gores Landing and Mr. Davies Sr. were vicariously liable for the actions of Mr. Davies Jr. The determination of that issue will require

an inquiry into whether any duty of care existed, whether it was breached, as well as the nature of the relationship between Mr. Davies Jr. and the appellants.

IV. SECOND GROUND OF APPEAL

[16] The appellants' second submission is a variation of their first. They argue that even if in its 2017 decision this court did not find that a duty of care existed, it did hold that there was a genuine issue requiring a trial as to whether Mr. Davies Jr. ought to have foreseen the risk of injury to Mr. Bonello posed by his provision of the looped rope for the tug-of-war. The appellants submit that the third parties had more involvement than Mr. Davies Jr. in causing the injury sustained by Mr. Bonello. Consequently, the motion judge erred in not finding that there was a genuine issue requiring a trial regarding the alleged negligence of the third parties.

[17] The motion judge did not err. The evidence disclosed differences between the conduct of Mr. Davies Jr. and that of the third parties. Unlike the third parties, Mr. Davies Jr. assisted his father with tasks at Gores Landing and on the day of the event he "scoured" the grounds until he found a rope belonging to Gores Landing, which he provided to those organizing the tug-of-war. Moreover, in assessing whether the Third Party Claim gave rise to a genuine issue requiring a trial, the motion judge was satisfied that the evidentiary record enabled him to reach a fair and just determination on the merits of the third parties' liability. He

thoroughly considered the largely undisputed evidence about the acts and omissions of the third parties in light of the allegations advanced in the Third Party Claim and the applicable legal principles. In short, the motion judge assessed the liability of the third parties in light of the evidence relating to the third parties; at the trial of the main action, the liability of the defendants will be assessed in light of the entirety of the evidence relating to the defendants.

[18] The sequence of adjudicating the main action and Third Party Claim in this proceeding departs from the norm for third party claims seeking contribution and indemnity. The *Rules of Civil Procedure* require that a third party claim be tried at or immediately after the trial of the main action, unless the court orders otherwise: r. 29.08(2). That sequence serves two of the policy objectives of the third party procedure – binding the third parties to the results of the final determination on the merits as between the plaintiff and defendant, together with avoiding inconsistent outcomes in factually related proceedings: *Barclays Bank v. Tom* (1992), [1923] 1 K.B. 221 (C.A.), at p. 224, quoted in W.B. Williston & R.J. Rolls, *The Law of Civil Procedure* (Toronto: Butterworth, 1970), at p. 426; Holmsted & Watson, *Ontario Civil Procedure*, loose-leaf (2018-Rel. 5) ed by Garry D. Watson and Derek McKay (Toronto: Thomson Reuters, 1984), at p. 29-11. Those same policy considerations apply to the sequencing of summary judgment motions in respect of a main action and a third party claim.

[19] Here, the dismissal of the Third Party Claim has been upheld before the trial of the main action, scheduled for later this fall. That said, in the present case the plaintiff is represented by a law firm well-experienced in the personal injury field. The plaintiff did not name the third parties as defendants in his action. Nor has the plaintiff claimed any procedural unfairness from the sequence of the dispositions: the plaintiff was represented by counsel before the motion judge but did not formally appear on this appeal. In those circumstances, no prejudice arises from the sequence of the final dispositions of the main action and Third Party Claim.

V. THIRD GROUND OF APPEAL

Statement of the issue

[20] There is no dispute that the motion judge correctly articulated the principles involved in the two-stage duty of care analysis laid out in the *Anns/Cooper* test – *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K.H.L.); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 – which were summarized recently by the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855 and *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587.

[21] As well, the appellant agrees that the motion judge properly identified the legal principles applicable to an allegation of failure to act, as set out in *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at paras. 31 to 44.

[22] However, the appellants argue that the motion judge misapplied those principles in the circumstances of this case, especially with respect to the proximity and foreseeability elements of the first branch of the *Anns/Cooper* test.

[23] The appellants acknowledge that “an impromptu and friendly tug-of-war by tenants of a community is not a high risk adventure”, echoing the motion judge’s finding that a tug-of-war game is not an inherently risky activity: at para. 38. However, they argue that a game of tug-of-war becomes hazardous when the participants have actual knowledge of the presence of a loop in the rope. They contend that the motion judge erred by failing to address the evidence of actual knowledge of the risk by the participants.

The principles in the first step of the *Anns/Cooper* test

[24] Under the *Anns/Cooper* test, demonstrating the existence of a *prima facie* duty of care requires establishing two elements: reasonable foreseeability of harm and proximity: *Rankin’s Garage*, at para. 21.

[25] The principle of reasonable foreseeability of harm requires an inquiry into whether there was reason for a defendant to have contemplated that his or her conduct could result in the harm complained of: *Rankin’s Garage*, at para. 22.

When determining whether reasonable foreseeability is established, the proper question to ask is “...whether the plaintiff has offered facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged”: *Rankin’s Garage*, at para. 24.

[26] Foreseeability alone is not enough to establish a *prima face* duty of care; proximity also must be established: *Livent*, at para. 23. The proximity analysis ascertains “whether the parties are in such a ‘close and direct’ relationship that it would be ‘just and fair having regard to that relationship to impose a duty of care in law’”: *Livent*, at para. 25. Courts must examine all relevant factors arising from the relationship between the plaintiff and the defendant: *Livent*, at para. 29. Those factors include the “expectations, representations, reliance, and the property or other interests involved” as between the parties: *Livent*, at para. 29; *Rankin’s Garage*, at para. 23.

The negligent acts pleaded against the third parties

[27] Assessing the motion judge’s reasons first requires a clear understanding of the basis upon which the appellants seek contribution and indemnity from the third parties. Their Third Party Claim pleads allegations of both wrongful acts and wrongful omissions.

[28] As to the wrongful acts, the Third Party Claim first pleads that the “Third Parties were responsible for arranging, convening and causing the game of tug

of war.” However, the motion judge found that there was no evidence that any of the third parties was an organizer or supervisor of the game and that none of the third parties intentionally attracted and invited persons to an inherent and obvious risk that he created or controlled: at para. 38. The appellants have not demonstrated that the motion judge made a palpable and overriding error in so finding.

[29] The Third Party Claim goes on to plead, as an additional wrongful act, the third parties’ participation in the game: “It was [for] the Third Parties, as adult men organizing and participating in a tug of war, to ensure that the tug of war would be accomplished in a manner that was safe to all participants.” But, as participants in the tug-of-war, they “permitted an open loop in the rope and commenced the tug of war with a loop being in the rope.” Although this allegation is framed in language of a wrongful act, in substance it alleges a wrongful omission by the third parties – i.e., having seen loops in the rope provided for the event, they failed to remove the loops before starting the tug-of-war.

[30] As well, the Third Party Claim expressly pleads wrongful omissions by the third parties: they did not prevent Mr. Bonello from putting his left hand arm through the loop before commencing the tug of war. Accordingly, the third parties “failed in their duties owed to each other to ensure that the tug of war was accomplished in a safe fashion and [this] resulted in injury to [Mr. Bonello]”.

Analysis

[31] The motion judge considered the allegations made against the third parties from two perspectives: as allegations of a failure to act: at paras. 37 to 39; and as the commission of overt acts: at paras. 40 to 42.

[32] Treating the allegations as ones of a failure to act, the motion judge considered the decision of the Supreme Court of Canada in *Childs*. There, the court stated, at paras. 31 and 34, that where the conduct alleged against a defendant is a failure to act, foreseeability alone may not establish a duty of care – the nature of the relationship must be examined to determine whether there is a nexus, special link or proximity between the parties.

[33] In *Childs*, the court identified three circumstances in which a positive duty to act had been imposed: (i) where a defendant intentionally attracts and invites others to an inherent and obvious risk that he or she has created or controls; (ii) where there exists a paternalistic relationship of supervision and control; and (iii) where the defendant either exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large: at paras. 35-37. The thread running through these situations is the “defendant’s material implication in the creation of risk or his or her control of a risk to which others have been invited”: at para. 38.

[34] The motion judge concluded that the evidence of the third parties' involvement in the tug-of-war did not fall into any of the three circumstances identified in *Childs*. In the course of his analysis, the motion judge specifically took into account the evidence that some of the third parties observed loops in the rope and one, Mr. Mike Buttigieg, testified that he had warned Mr. Bonello not to put his hand through a loop. His finding that the third parties did not invite or attract Mr. Bonello to an inherent and obvious risk that they had created or controlled was amply supported by the evidence, as were his conclusions that none of the participants stood in a special relationship with Mr. Bonello, such as a relationship of a paternalistic character, or was engaging in a commercial activity with implied responsibilities to the public at large. This situation involved the voluntary participation by members of a community of campers and cottagers in an outdoor recreational activity, which engaged two teams of competent adults: at para. 39.

[35] Applying the principle set out at para. 39 of *Childs* that the law does not impose a duty to eliminate risks and accepts that competent persons have the right to engage in risky activities, the motion judge concluded:

This is a situation where the autonomy of the participants in the game of tug-or-war should not be impinged by the imposition of a duty of care on each participant requiring him to take positive actions that would minimize or eliminate the possible risks to other participants in the game, including Mr. Bonello.

[36] I see no error in his conclusion.

[37] The motion judge then examined the claim against the third parties as one asserting the commission of an overt negligent act. He described the alleged overt act of the participants as engaging in the tug-of-war without ensuring that the game would be accomplished in a manner that was safe to all participants.

[38] Here, the motion judge's analysis focused on whether the appellants had demonstrated the reasonable foreseeability of the harm suffered by Mr. Bonello. The motion judge relied upon the decision in *Garratt v. Orillia Power Distribution Corporation*, 2008 ONCA 422, 90 O.R. (3d) 161, where this court stated, at para. 48:

Foreseeability of the *possibility* of resultant harm is inadequate to establish a duty of care. We do not expect omniscience, prescience or clairvoyance, or impose a duty of care on all who fall short of any such standard. Foreseeability of the probability of resultant harm involves the *likelihood* that such harm will result from the alleged wrongdoer's conduct. Said in different words, a duty of care is established only where what happened was a natural and probable result of what the alleged wrongdoer did or failed to do.

[39] This principle was echoed by the Supreme Court in *Rankin's Garage* where the majority stated, at para. 46: "The fact that something is *possible* does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was by definition possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met".

[40] Applying those principles, the motion judge held, at paras. 41-42:

In my consideration of whether the third parties participation in the tug-of-war game directly caused foreseeable injury to Mr. Bonello, I am mindful of the statements made by the Court of Appeal in *Garratt* [at para. 48] that foreseeability of the *possibility* of harm resulting from commission of an overt act is inadequate to establish a duty of care. Many activities that are common, everyday, recreational activities involve the possibility of harm or injury. Mere participation in a recreational tug-of-war game would not involve the likelihood that harm will result. Even if a participant observed loops in the rope to be used for a tug-of-war game, and even if steps were unsuccessfully taken to try to remove loops, the injury suffered by Mr. Bonello is not a natural and probable result of participation in a tug-of-war game using a rope with loops. To impose a duty of care on the participants would, in my view, require an expectation of prescience or clairvoyance on their parts. The Court of Appeal in *Garratt* has held that there is no duty of care in such circumstances.

It would not have been within the reasonable contemplation of any of the participants in the tug-of-war game that the injury suffered by Mr. Bonello would be a natural and probable result of carelessness on the part of each participant in relation to what he did or did not do. [Underlining added; Italics in original.]

[41] That conclusion regarding the reasonable foreseeability of harm is fully supported by the evidence in respect of the third parties who did not see any loops or who saw others trying to remove loops: Anthony Cook, Gabe Mansueto, and Jeff Jaglel.

[42] The evidence concerning the three other third parties is different. Gerald Chestnut saw loops in the rope, removed one of them, and knew others

remained. Frank Buttigieg deposed that he saw knots in the rope and was concerned that the knot would give in. However, he did not think anyone would put their hand in the loop because that would be a foolish thing to do. Michael Buttigieg thought putting one's hand through the loop would be a bad idea. He recalled telling Mr. Bonello not to do so but, given that he was standing behind Mr. Bonello, he did not see Mr. Bonello's hand in the loop.

[43] This evidence could support an inference that these three third parties had some foresight of the possibility of injury from the presence of loops in the rope. The motion judge found the degree of foresight did not rise to the level of establishing reasonable foreseeability of harm.

[44] Given that the issue of the existence of a duty of care involves a question of law, deference is not owed to that conclusion of the motion judge. However, I would not interfere with it. As mentioned earlier in these reasons, the appellants' pleading of a wrongful act is, in substance, an allegation of a positive duty to act – either to warn Mr. Bonello or to remove the loops. In those circumstances, the proximity element plays a significant role in the duty of care analysis. And, as I have stated, the motion judge did not err in concluding that none of the circumstances identified in *Childs* as giving rise to a positive duty to act are present in the circumstances of this case.

VI. DISPOSITION

[45] For these reasons, I would dismiss the appeal.

[46] The respondent third parties are entitled to their costs of the appeal. Based upon the agreement of the parties, each respondent third party is entitled to costs of the appeal from the appellants fixed in the amount of \$5,000, inclusive of disbursements and applicable taxes.

Released: "DB" Feb 20, 2019

"David Brown J.A."
"I agree. David M. Paciocco J.A."
"I agree. B. Zarnett J.A."