Citation: Economy Foods v. Klassen, 2001 MBCA 16

Date: 20010202
Dockets: AI99-30-04404
AI99-30-04407
AI99-30-04409

IN THE COURT OF APPEAL OF MANITOBA

Coram: Huband, Kroft and Monnin JJ.A.

B E T W E E N:

ECONOMY FOODS & HARDWARE LTD. and ECONOMY CONSOLIDATED ENTERPRISES LTD.	)	*C. A. Sherbo for the Appellant Margaret Klassen*
(Plaintiffs) Respondents	)	*V. E. Rachlis for the Appellant Kerri Lynne Klassen*
- and -	)	*R. A. Horton for the Appellant Christopher Klassen*
MARGARET KLASSEN, trading as "DUTCH FLORISTS," KERRI LYNNE KLASSEN and CHRISTOPHER SCOTT KLASSEN	)	*D. J. Rosin for the Respondent Economy Foods & Hardware*
(Defendants) Appellants	)	*D. G. Hill and P. Maia for the Respondents Economy Consolidated Enterprises and Apex Realty*
- and -	)	*M. G. Finlayson for the Respondents Albert Klassen and Winkler Building Supplies*
ECONOMY CONSOLIDATED ENTERPRISES LTD., ALBERT GEORGE KLASSEN, WINKLER BUILDING SUPPLIES (1981) LTD. and APEX REALTY PROPERTIES INC.	)	*Appeals heard: September 25, 2000*
(Third Parties) Respondents	)	*Judgment delivered: February 2, 2001*

KROFT J.A.

1 This appeal is from a declaration made by the Court of Queen's Bench in response to a request that the opinion of the court be given

pursuant to a stated case. The proceedings were brought by the plaintiffs, Economy Foods & Hardware Ltd. and Economy Consolidated Enterprises Ltd. (the plaintiffs) against Margaret Klassen, trading as Dutch Florists, Kerri Lynn Klassen, and Christopher Scott Klassen (the Klassen group) as defendants. The Klassen group of defendants has named the plaintiff, Economy Consolidated Enterprises Ltd., Albert George Klassen, Winkler Building Supplies (1981) Ltd., and Apex Realty Properties Inc. as third parties. They will be referred to as the "renovation group" of defendants.

2 The action relates to a fire, which took place in a shopping mall in the Town of Winkler, Manitoba, on October 14, 1992. It began in the washroom in the florist shop operated by Margaret Klassen. The source of the fire was a candle which had been lit and left burning by the Klassen children as a deodorizer when they used the washroom. It was never extinguiushed. The fire spread not only through the washroom and the florist shop but throughout the mall. That, in turn, caused the sprinklers to be set off in other areas of the mall. Various tenants therein sustained fire, smoke, or water damage, as did the Economy companies, who were owners of the mall. In all, 13 actions are pending in respect to damages allegedly flowing from the above-described event. The final disposition of this case will require a decision as to whether only one group of negligent defendants was responsible for the damage suffered by the various plaintiffs or whether both were responsible for the entire fire. If it is the latter, a decision will have to be made as to how, if at all, responsibility is to be apportioned.

3 Six years before the fire, in the summer of 1986, the florist shop had been moved from one location to another within the mall. When the work associated with the construction of the new washroom walls was completed, the washroom in the florist shop was left with no sprinkler protection, contrary to the building code requirements. The renovation group of defendants, collectively, were responsible for the failure to have a sprinkler installed in the washroom area of the florist shop.

4 All of the parties to this litigation agreed to the following facts and assumptions for the purposes of the motion which was brought before Keyser J. in the Court of Queen's Bench:

(a) one or more members of the Klassen group of defendants negligently caused the original onset of the fire;

(b) one or more of the members of the renovation group of defendants negligently failed to ensure that a sprinkler head was located in the washroom after the walls were finished; and

(c) had there been a sprinkler head accessible to the washroom, it would have contained the fire, smoke, and water damage to the florist shop and the area of the mall immediately adjacent thereto.

5 The motion was brought before the court under Queen's Bench Rule 22, which reads, in part, as follows:

Question of law
22.01(1) Where the parties to a proceeding concur in stating a

> question of law in the form of a special case for the opinion of the court, any party may move before a judge to have the special case determined.
>
> **Hearing by judge**
> **22.01(2)** Where the judge is satisfied that the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, the judge may hear and determine the special case.

6 The question that was presented to the court was as follows:

> Is the Klassen Group of Defendants responsible only for the damages caused by the contained fire, and the Renovation Group of Defendants responsible for the balance of the damages, that is, the further damages caused by the full fire? Or, are the Klassen Group of Defendants responsible for the damages caused by the full fire, together with the Renovation Group of Defendants, subject to all rights of contribution as may exist between and among them?

7 The court was provided with the necessary background by way of a special case, which set forth in greater detail what is summarized above.

8 Not surprisingly, counsel for the Klassen group of defendants argued that their responsibility should extend only to the contained fire, while counsel for the renovation group of defendants argued that on some basis all defendants must share responsibility for both the contained fire and the full fire.

9 The learned motions judge concluded that the two sets of defendants were each responsible for both the contained and the full fire. Indeed, she went further and concluded that they were equally responsible for the

whole fire loss. For purposes of this appeal, it has been agreed that the trial judge's opinion that liability must be divided equally goes beyond the question that was presented to the court and should be deleted from the response to the stated case.

10 The Klassen group of defendants brings the matter before this Court by way of appeal from the Queen's Bench answer to the stated case.

11 No objection was taken to the proceeding by any party and this Court did not raise any procedural matters on its own motion at the time of the appeal hearing, but the Court does have some concern as to whether the litigation is ripe for an appeal. There is a body of law which suggests that trials should be completed before appeals are launched. In this case, that would involve continuing the proceedings to determine the apportionment of responsibility and the assessment of damages. However, since the issue was not raised or argued by any of the parties, and since there is a considerable degree of discretion involved, this Court is prepared to deal with the matter now.

12 The argument of the appellants is clear, articulate and has a disarming simplicity within the context of these circumstances. Their submission raises the issue of whether they and the renovation group of defendants are concurrent or non-concurrent tortfeasors. The Klassen group says that the motions court judge erred in viewing the two groups as concurrent tortfeasors who caused indivisible damage and that she should have treated them as non-concurrent tortfeasors who caused definable and different damages. Basically, the Klassen group says that where the acts of

negligence occur at different times and when there is no physical difficulty in separating which damage related to the "contained" fire and which to the "spread" fire that the allocation of damages is obvious.

13 It has been the position of the Klassen group throughout that apportionment legislation designed to deal with joint and several liability such as *The Tortfeasors and Contributory Negligence Act,* R.S.M. 1987, c. T90, only has application when the damage in issue arises from concurrent torts. In the case of non-concurrent torts, as the Klassens say this is, such legislation has no application and the damage itself must be delineated as it relates to each specific tort.

14 The respondents do not dispute that a consideration of the difference between concurrent and non-concurrent torts must be made to determine the outcome of this case. They say, however, that the methodology of the appellants is a superficial, mechanistic one and that it glosses over the need to address fundamental principles of causation. They say that determining causation, in turn, necessitates a careful analysis of whether the damage is, truly, divisible or not. They insist that the acknowledgement that had there been a sprinkler in the washroom, as there no doubt should have been, the fire, smoke and water damage would have been contained to the florist shop and area of the mall immediately adjacent thereto, does nothing to answer the question of what negligence caused what damage.

15 In various texts and articles addressing concurrence in the law of tort, some writers place more emphasis than others on the issue of causation. I think it fair to say though that none rule causation out as an

essential factor.

CONCURRENCE, DIVISION AND CAUSATION

16 The issues of concurrence, division and causation have been explored by a number of authors learned in the field of torts. They do not all conduct their analyses in the same manner but I think it fair to say that they would all agree that the subjects to which I have referred are all relevant to cases like the one before us. Counsel on both sides of this argument attempted to attach particular significance to apparent differences in the approaches of the writers but I found little of real substance to the debate. Accordingly, I will deal only briefly with this part of their submissions.

17 In *Joint Torts and Contributory Negligence* (Stevens & Sons, London: 1951), Glanville Williams differentiates between joint and several tortfeasors and also between concurrent and non-concurrent tortfeasors. At p. 1, he describes when tortfeasors are joint tortfeasors:

> Two or more tortfeasors are joint tortfeasors (a) where one is the principal of or vicariously responsible for the other, or (b) where a duty imposed jointly upon them is not performed, or (c) where there is concerted action between them to a common end.

Later on the same page he propounds that:

> Where tortfeasors are not joint they are necessarily "several," "separate," or "independent."

18 In the present case, it seems clear to me that the Klassen group and the renovation group must be classified as "several" tortfeasors. The negligence of one group was separate and independent from the other. They do not fall within Williams' definition of joint tortfeasors. At different times, in different ways, they each failed to perform different duties which were theirs to discharge independently.

19 Williams also addresses the difference between concurrent tortfeasors and non-concurrent tortfeasors. At p. 1, he defines concurrent tortfeasors as: "tortfeasors whose torts concur (run together) to produce the same damage."

He goes on at p. 2 to explain that:

> Where each concurrent tortfeasor commits a tortious act (as in the case of several concurrent tortfeasors), these tortious acts need not be contemporaneous, but one may take place after the other. "Concurrence" has no reference to time, except that both torts must precede the damage.
>
> [underlining is mine]

Later, at p. 20, he describes a non-concurrent tortfeasor when he says:

> Parties are not concurrent tortfeasors, whether joint or several, when there is no concerted action and their acts cause different items of damage.

20 Thus, concurrent tortfeasors are those whose individual torts concur to produce the same damage whereas non-concurrent tortfeasors are those whose actions cause different items of damage. The dispute in this case is

whether the negligence of the Klassen group and the negligence of the renovation group concurred to produce the same damage (i.e. the full fire), or alternatively, if the negligence of the Klassen group can be said to have contributed to the cause only of the limited damage related to the contained fire while the negligence of the renovation group caused the more extensive damage caused by the spread of the fire.

21 Klar, Linden, Cherniak and Kryworuk, *Remedies in Tort* (Toronto, Carswell: 1986) and Solomon, Feldthusen & Mills, *Cases and Materials on the Law of Torts* (2nd ed.) (Toronto, Carswell: 1986), write in a similar vein. They all stressed that where there are several independent tortfeasors, the court must decide whether the plaintiff's injuries are divisible but go on to make clear that in their view there are actually two separate questions to be asked: (1) can the injury in question be divided into distinct losses, and (2) can each loss be attributed to the conduct of a particular tortfeasor?

22 For example, G.H.L. Fridman, *The Law of Torts in Canada, Vol. 2,* (Toronto, Carswell: 1990), states at p. 346:

> When the acts of several tortfeasors cause different damage, the question to be determined is whose act caused which damage, so that the court can hold the individual tortfeasor responsible *in solidum* for the damage that can be traced to him, and can exonerate him from liability for all other damage. Causation is the issue.

23 The Klassen group, for its part, submits that learned authors such as Prosser and Keeton, *The Law of Torts,* 5th ed. (West Publishing Co.,

Minnesota: 1984) and J. G. Fleming, *The Law of Torts,* 9th ed. (Carswell: 1998) have different opinions and, as a result, a different conclusion should be reached by the Court. For example, they refer to Prosser and Keeton where it is written at p. 345 that:

> Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes. Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made. Where no such basis can be found, the courts generally hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it.

24 In light of such statements and relying on the assumptions made in the stated case, the Klassen group suggests that it is self-evident that in the case under review, the contained fire and the full fire are separable and definable and that the loss that should be attributed to each is virtually self-evident.

25 With respect I must say that in my view counsel for the Klassen group has over-simplified both the theories of the text writers and her own interpretation of the facts. As already suggested, the alleged ease in allocating damages does not in itself make the two tortious acts now under review non-concurrent.

26 Firstly, it must be noted that whatever priority Prosser and Keeton or Fleming attach to the question of non-concurrence and to divisibility, they do not ignore causation. When Fleming suggests at p. 230 in his text that if "it is practically feasible to split up the loss and attribute identifiable parts to each of the defendants, then liability will ordinarily be confined to that portion for which each is separately responsible," he is acknowledging that causation must be examined.

27 Prosser and Keeton make similar statements. They leave no doubt that even where it is feasible and practical to split up the damages into separate parts, one must still be able to assign the actual cause of each separate part to one particular defendant alone. Only after that is done can one defendant be considered a non-concurrent tortfeasor in relation to that item of damage.

28 I have concluded from the academic writings that there is, in fact, general agreement amongst the authors that in situations like ours, liability can only be treated as non-concurrent where it is feasible both to split up the damage into identifiable parts and to attribute the separate parts as being caused solely by one defendant or the other.

CANADIAN CASE LAW

29 In my view, a pragmatic analysis of some of the recent Canadian cases made in the context of their particular facts gives a better guide to what should be done by us. Although it is not in chronological order, perhaps the most comprehensive Supreme Court decision dealing with

causation where there are divisible injuries and multiple tortious acts is *Athey v. Leonati*, [1996] 3 S.C.R. 458. There, the Supreme Court was addressing the issue of whether the liability for a plaintiff's disc herniation could be apportioned between tortious and non-tortious causes, where both were necessary to create the injury. In this case, the plaintiff had a pre-existing back condition, but only suffered the disc herniation after two car accidents, in which the other drivers were solely at fault. The trial judge had decided that the herniation was the combined result of the accidents (25%) and the pre-existing back condition (75%), and awarded the plaintiff only 25% of the proved damages. The Supreme Court of Canada overturned this decision, indicating that the law was perfectly clear that where a tortious act is a contributing cause to an injury, the person responsible for that tortious act will be liable for the full loss, even if there are other significant factors which helped to produce the loss. Obviously, the facts bear no great similarity to ours. Nonetheless, Major J., for the Court, carefully addressed the principles related to the law of causation. I think it appropriate to quote a number of paragraphs from his reasons (at paras. 13–20):

> **A. General Principles**
>
> Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education,* [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw,* [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board, supra.* A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw, supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A., aff's [1989] 2 S.C.R. 979.

In *Snell v. Farrell, supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward,* [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

This proposition has long been established in the jurisprudence. Lord Reid stated in *McGhee v. National Coal Board, supra*, at p. 1010:

It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of

> the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause his injury.
>
> The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: Fleming, *supra*, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: *School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co.*, [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, aff'd [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (2nd ed. 1996), at p. 748.
>
> This position is entrenched in our law and there is no reason at present to depart from it.

30 The decision in *School Division of Assiniboine South No. 3 v. Greater Winnipeg Gas Co.* (also cited as *School Division of Assiniboine South No. 3 v. Hoffer* (1971), 21 D.L.R. (3d) 608 (Man. C.A.)), to which Justice Major refers with approval, was written by Chief Justice Dickson while he was still a member of this Court. It involves an extensive fire loss for which several tortfeasors were found responsible. The negligent acts were separate in time and completely different in nature. The scenario differs from ours in that the elements of damage could not be easily divided or allocated as amongst the separate torts. That issue of concurrence or non-concurrence was not raised or considered in the *Hoffer* case. There, the negligent operation of a snowmobile, owned by Mr. Hoffer and operated by his 14-year-old-son, struck an unguarded natural gas riser pipe on an exterior school wall. Gas leaked from the damaged pipe. When it reached the pilot light, located inside the building, an explosion and fire resulted. The court rejected the argument that the

Hoffers should be liable only for the damage which would have occurred if the gas company had properly protected its pipe. In the course of his reasons, Dickson J.A. made the following comments at p. 615:

> Counsel for Michael Hoffer concedes that the boy was negligent and that the type of damage that resulted was reasonably foreseeable by him as by any other rational person. Counsel submits, however, that the causation chain, the first link of which was forged by his failure to put the machine on the kick stand before starting it, ended when the riser pipe had been broken and the gas began to escape. I cannot accept this argument.

And later on that page he said:

> It is manifest that Michael's culpable conduct was a causally relevant factor. His failure to exercise due care was the "cause" of the damage in the proper sense of the term. If one applies the "but for" test it is readily apparent that the plaintiff's harm would not have occurred but for Michael's fault. Michael cannot escape liability for the consequences of that fault merely because other causal factors for which he is not responsible also contributed to the damage which resulted. He was *a* cause, though not the *sole* cause of the harm. His fault was a cause-in-fact. It is undisputed that if A and B cause loss to C, each of A and B is accountable for that loss. In 28 Hals., 3rd ed., p. 32, it is said:
>
> > As a rule a defendant is not relieved of his responsibility merely because his negligence operates upon some state of affairs already created, whether wrongfully or not, by a third person and so causes injury.

31 *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, [2000] B.C.J. No. 1828 (Q.L.), 2000 BCCA 505, is a very recent decision involving the division and allocation of damages between a defendant and a plaintiff, both of whom were found to be guilty of negligent conduct, which

although very different in nature and time of commission, was a significant contributor to the entire fire.

32 The learned trial judge had found that the defendant, which had been retained to renovate the plaintiff's lengthy grain loading wharf in Vancouver, through its negligence, had caused the onset of a destructive fire. The plaintiff was found to be contributorily negligent not by reason of anything it had done in starting the ignition, but by reason of its failure to have in place an adequate fire protection system that would have significantly limited the spread of the fire. The judge compared the respective degree of blame attributable to the contractor and the owner as it related to the entire fire loss and she held the defendant to be 75% at fault and the plaintiff 25%.

33 On appeal, Finch J.A., writing for the majority, assessed the respective blameworthiness of the parties. He concluded, based on the trial evidence, that there was no way to justify a conclusion that the fault of the parties differed in degree. In such circumstances and pursuant to the *Negligence Act* of British Columbia, c. 298, he ruled that liability should be shared equally.

34 McEachern C.J.B.C. came to the conclusion that the owner's degree of negligence was clearly greater than that of the defendant. He would have ordered that 25% of the entire loss be borne by the contractor and that 75% be borne by the plaintiff owner.

35 Neither the majority nor the minority disagreed with the trial judge's

finding that both bore some responsibility for the entire fire. No one suggested that damages should be allocated simply on the basis of what part of the loss might have been "contained." If it were that simple then one could have resolved this case by simply measuring the actual distance from the point of ignition near the end of the wharf to the first retaining wall.

36 I should point out here that I am well aware that the *Negligence Act* of British Columbia and the joint *Tortfeasors and Contributory Negligence Act* of Manitoba are not uniform legislation and that contribution is not dealt with in exactly the same way. These differences, however, have no bearing on the comments which I have made. Neither have I ignored the Klassen group's reliance on the Supreme Court of Canada decision in *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, which counsel for the Klassen group describes as being directly on point. In *Laurentide*, a hotel was destroyed by a fire started by a guest who had not extinguished a cigarette. Soon after the fire started firefighters arrived on the scene and began using their hoses. However, the water stopped due to improper maintenance of the fire hydrants and was interrupted for some 40 minutes. At trial, the liability of the hotel guest was limited to $50,000 being the approximate amount of the damage caused prior to the time the water flow ceased. The city was found liable for all the remaining damage.

37 The Supreme Court ultimately upheld the trial division. This is a result that seems to be at odds with the argument of the renovation group.

It must be pointed out, however, that it was the Civil Code of Lower Canada which applied to this case. Section 1053 of the Code, as it existed then, provided:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

38 All but one of the presiding judges specifically ruled that it was this clause and not the public common law that applied. It seems to me that the Civil Code addressed the allocation of damages, while the statute law of Manitoba addresses the apportionment of responsibility.

39 My conclusion that the *Laurentide* case is of little relevance is supported by the fact that in the more recent case of *Athey v. Leonati*, to which I have referred extensively, no mention whatsoever is made of the *Laurentide* decision. Neither was it mentioned in *Alberta Wheat Pool*.

40 Each of the counsel in these proceedings recited other cases to which I have not and will not make reference. It should be understood, however, that they have been considered and that, in my view, they neither change nor add to the conclusions which I have reached.

41 In the final analysis, I can do no more than say, as I probably could have at the beginning, that this is yet another "but for" case. The "entire fire" could not have taken place "but for" the negligence of the Klassen group notwithstanding that the fire might have been contained "but for" the negligence of the renovation group.

42 The trial judge was correct when she declared "that the answer to the question for the opinion of the court is that the Klassen group of defendants is responsible for the damages caused by the whole of the fire together with the renovation group of defendants, subject to all rights of contribution as may exist between and among them."

43 It must be repeated, however, that there is agreement amongst all counsel and this Court that she erred when she stated in her reasons that "both sets of defendants are equally at fault." The degree of responsibility for the damages arising out of the entire fire will be determined by a Court of Queen's Bench judge after the hearing of evidence.

44 This appeal is dismissed with costs.

J.A.

I agree: J.A.

I agree: J.A.