Date: 19990813
Docket: CI 93-01-74468
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	)	COUNSEL
	)	
ECONOMY FOODS & HARDWARE LTD.,	)	
	)	Plaintiff:
Plaintiff,	)	6Daryl J. Rosin
	)	
	)	Defendant Margaret Klassen:
	)	Charles A. Sherbo
MARGARET KLASSEN, trading as "DUTCH FLORISTS", CHRISTOPHER SCOTT KLASSEN and KERRI LYNNE KLASSEN,	)	Defendant Christopher Scott Klassen:
	)	Randall A. Horton
	)	
	)	Defendant Kerri Lynne Klassen:
Defendants,	)	Vivian E. Rachlis
- and -	)	
	)	
	)	
ECONOMY CONSOLIDATED ENTERPRISES LTD., ALBERT GEORGE KLASSEN, WINKLER BUILDING SUPPLIES (1981) LTD. and APEX REALTY PROPERTIES INC.,	)	Third Parties Economy Consolidated and Apex Realty Properties:
	)	Joan M. Holmstrom
	)	
	)	Third Parties Albert George Klassen and Winkler Building Supplies:
Third Parties.	)	Michael G. Finlayson
	)	
AND B E T W E E N:	)	
	)	
ECONOMY CONSOLIDATED ENTERPRISES LTD.,	)	
	)	
	)	
Plaintiff,	)	
- and -	)	
	)	Judgment delivered:
	)	August 13, 1999.

MARGARET KLASSEN, trading as "DUTCH FLORISTS", CHRISTOPHER SCOTT KLASSEN and KERRI LYNNE KLASSEN,

Defendants,

- and -

ECONOMY CONSOLIDATED ENTERPRISES LTD., ALBERT GEORGE KLASSEN, WINKLER BUILDING SUPPLIES (1981) LTD., and APEX REALTY PROPERTIES INC.,

Third Parties.

KEYSER J.

[1] The defendant Kerri Lynne Klassen has moved for determination of a special case pursuant to Queen's Bench rule 22.01 arising out of a fire which occurred at the Gladstone Shopping Mall ("the mall"), in the Town of Winkler, in Manitoba, on October 14, 1992.

[2] Queen's Bench rule 22.01 provides as follows:

> **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.
>
> **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.

[3] All parties have agreed to the wording of the special case, and the assumptions which the parties have made for the purposes of the motion are as follows:

(i) one of, or more than one of, Margaret Klassen, Christopher Scott Klassen or Kerri Lynne Klassen, (collectively "the Klassen group of defendants") negligently caused the original onset of the fire;

(ii) one of, or more than one of, Economy Consolidated, Winkler Building Supplies, Margaret Klassen or Albert Klassen (collectively the "renovation group of defendants") was negligent in failing to ensure that a sprinkler head was located in the washroom after the walls were finished; and

(iii) 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 area of the mall immediately adjacent thereto ("the contained fire").

[4] All parties have agreed to be bound by the determination of the court on the following question:

> 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 is 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?

BACKGROUND

[5] The following agreed background is part of the special case as stated for the court:

1. At all material times, Margaret Klassen operated a florist shop in the mall under the name "Dutch Florists" ("the florist shop").
2. Prior to June 30, 1994, Gladstone Mall Corporation was the owner of the mall. The mall was operated by Gladstone Mall Corporation, Freestone Ventures Ltd. and A. Friesen Ventures Ltd. directly or, subsequent to August 1, 1990, through their property manager, Apex Realty Properties Inc. ("Apex").
3. There were a number of businesses which occupies leased premises at the mall ("the tenants").
4. On or about June 30, 1994, Freestone Ventures Ltd., Gladstone Mall Corporation, F.G.H. Properties Ltd., Winkler Furniture & Appliances Ltd., Economy Foods & Hardware Ltd. and A. Friesen Ventures Ltd. amalgamated pursuant to s. 180 of the ***Corporations Act***, R.S.M. 1987, c. C225. The amalgamated corporation was named Economy Consolidated Enterprises Ltd. ("Economy Consolidated"). The owner(s) of the mall will

hereinafter be referred to as "Economy Consolidated" regardless of whether the events referred to occurred before or after the amalgamation.

5. In the summer of 1986, the florist shop (along with three other tenants) moved to a new location in the mall, at the request of Economy Consolidated.

6. A washroom was constructed at the florist shop's new location by Winkler Building Supplies (1981) Ltd. ("Winkler").

7. At the rear of the florist shop's new location there was a mechanical/electrical room containing switches affecting the entire mall (the "mechanical room"). As the mechanical room did not constitute part of the new space leased by the florist shop, Winkler was retained by Economy Consolidated to build two demising walls around the mechanical room and to perform related work for the move of the florist shop to this new location. Albert Klassen was an employee of Winkler who performed some of the construction work associated with the washroom.

8. At the time the work was done by Winkler, there was a sprinkler head located approximately one foot inside the mechanical room portion of the structure and, before the demising walls were constructed, the sprinkler head had been capable of servicing the mechanical room and the area where the new washroom was build.

9. After the demising walls were constructed, the mechanical room and the washroom became physically separated, and the fire sprinkler head became physically separated from, and inaccessible to, the washroom.

10. There was no sprinkler head in the washroom, and this absence may have constituted a breach of the Manitoba Building Code.

11. On or about October 14, 1992, Margaret Klassen was working in the florist shop. At approximately 4:15 p.m., Margaret Klassen's son Christopher Klassen (then age 15), and her daughter Kerri Klassen (then age 12), attended at the florist shop.

12. Christopher used the washroom. After using the washroom, he lit a candle which was located on top of the toilet tank in order to clear the odor in the washroom.

13. Kerri indicated that she wanted to use the washroom, so Christopher exited the washroom but left the candle burning.

14. Kerri next used the washroom. When she left the washroom, she did not extinguish the candle.

15. Prior to leaving the florist shop for the evening, Margaret Klassen undertook a walk-through of the space to ensure that all was in order. That walk-through did not include the washroom.

16. Margaret Klassen, Christopher and Kerri left the florist shop between 5:30 and 5:45 p.m.

17. Later that evening, a fire originated in the washroom of the florist shop, as a result of the candle having been left unextinguished, which spread both within and outside of the florist shop and eventually caused sprinklers to be set off through part of the mall. As a result, fire and smoke damage was caused to the florist shop. Smoke and water damage was also caused to the mall and the tenants (the "full fire").

THE LAW

[6] Counsel for the Klassen group of defendants have argued that its liability should be limited to the damages that would have been caused if a properly functioning sprinkler system had been installed by the renovation group of defendants. Counsel assert that this failure by the other defendants to contain the fire constituted a separate and divisible act of negligence for which the Klassen group of defendants should not be held liable. Their position is that two completely severable negligent acts occurred, with two resulting categories of damages. The position of the plaintiff and the renovation group of defendants is that no *novus actus* occurred such as would remove the Klassen group of defendants from being joint tortfeasors, because the negligence of the renovation group of defendants arises from a state of affairs that was already in existence before the fire started. They rely on s. 5 of the ***Tortfeasors and Contributory Negligence Act***, R.S.M. 1987, c. T90, which states:

> Where two or more defendants are found negligent they are jointly and severally liable to the plaintiff for the whole of the damages apportioned against both or all of them.

[7] Counsel for the Klassen group of defendants assert that the ***Tortfeasors and Contributory Negligence Act*** has no applicability in this case, since no concurrent torts were committed. Counsel rely on ***Desbrisay et al. v. Canadian Government Merchant Marine Limited et al.***, [1941] S.C.R. 230. There, goods belonging to the plaintiff were left on a pier and subsequently damaged by fire. The plaintiff sued two defendants, the steamship company which owned the pier and the carrier which had unloaded the goods. The fire started from unknown causes. At p. 234, Davis J. stated that:

> The distinction must be drawn, it seems to me, and it is a distinction vital to a case of this sort, between negligence in the origin of a fire and negligence in suffering a fire to spread. . . .

Counsel for the Klassen group of defendants rely on this statement to support their proposition that a court can find divisible acts of negligence involving a fire. This proposition was further articulated by John Fleming in ***The Law of Torts*** 5th ed. (Sydney: The Law Book Company Limited, 1977), at p. 187:

> . . . where each of several defendants causes only part of the total damage and it is practically feasible to split up the aggregate of loss and attribute identifiable parts to each of them, liability will ordinarily be confined to that portion for which each is separately responsible. . . .

However, he goes on a p. 188:

> . . . Since the legislative introduction of contribution between tortfeasors, it is perhaps questionable whether the same indulgence could be accorded to defendants in the future, now that it is possible for one who has paid for the whole loss to shift part of it to others responsible for the same damage.

[8] The Klassen group of defendants further relies on the case of ***Laurentide Motels Ltd. et al. v. Beauport (City)***, [1989] 1 S.C.R. 705 as completely analogous to the case at bar. In ***Laurentide***, a hotel guest negligently started a fire which would have been relatively easily contained had not City of Beauport hydrants malfunctioned. The City was found liable for the spread of the fire and damages were apportioned. Justice L'Heureux-Dubé quoted the trial judge with approval, at p. 807, as saying:

> In the case of fire, like that before the Court, a distinction has to be made between the fault that created the fire and the fault that caused it to spread . . . .

She continued at p. 808:

> . . . the causal link between the lack of water and the spread of the fire becomes inescapable. It is possible that subsequent measures could have halted the progress of the fire and so broken the causal link for all or part of the damage. The failure to take proper measures, as found by the trial judge, did not have this result: quite the contrary.

The lower court's apportionment of damages was upheld in the result by the Supreme Court of Canada.

[9] Counsel for the plaintiff and the renovation group of defendants point out that the ***Laurentide*** case involved the ***Civil Code of Quebec*** which does not mirror the Manitoba ***Tortfeasors and Contributory Negligence Act***. The provision of the ***Civil Code*** at issue in ***Laurentide*** was art. 1053, which states:

> 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.

This section invites the court to break down damages and attribute them to separate tortfeasors rather than make persons who are jointly responsible for causing damage jointly and severally liable for payment.

[10] Counsel for the plaintiff and the renovation group of defendants rely on ***School Division of Assiniboine South No. 3 v. Hoffer et al.*** (1971), 21 D.L.R.(3d) 608 as indistinguishable from the case at bar. The Klassen group of defendants disagrees, arguing that ***Hoffer*** dealt with foreseeability of damage and not divisibility of it. In ***Hoffer***, a negligently operated snowmobile hit a gas riser that had not been adequately protected and which collision caused an explosion. Counsel for Klassen group of defendants argue that in ***Hoffer*** only one explosion resulted, and thus, the negligence of the two parties caused concurrent damages, unlike the case at bar where the damages are totally divisible. They assert forcefully that the relevant time to consider is not when the fire started, but when the sprinkler head failed to function, which *novus actus* broke the chain of causation.

[11] Dickson J.A. (as he then was), writing for the majority of the Manitoba Court of Appeal in ***Hoffer***, stated at p. 615:

> . . . Accepting that the "chain of causation" can be broken by a *nova causa* or *novus actus interveniens*, it is clear that the state of affairs created by the gas company several years prior to the accident could not be considered a *novus actus*. Where a state of affairs has already occurred at the time of the wrongful act, that act is regarded as the cause of the damage in the absence of subsequent intervening factors.

In like fashion, and contrary to the assertions of the Klassen group of defendants, the damages from the full fire were not caused by a subsequent negligent act, since the lack of a sprinkler head pre-dated the setting of the fire. The negligence of the Klassen group of defendants operated on the pre-existing state; but for the candle being negligently left unattended, there would have been no damage at all. This is on all fours with ***Hoffer*** where, again, at p. 615, Dickson J.A. stated:

> 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. . . .

Dickson J.A. quotes from 28 ***Hals.***, 3rd ed., p. 32, that:

> 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.

[12] Section 2(2) of the ***Tortfeasors and Contributory Negligence Act*** states:

> The amount of the contribution recoverable from any person is such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court may exempt any person from liability to make contribution, or direct that the contribution to be recovered from any person amounts to a complete indemnity.

What is meant by extent of that person's responsibility for the damage? In ***Cempel v. Harrison Hot Springs Hotel Ltd.***, [1997] B.C.J. No. 2853 (B.C.C.A.), Lambert J.A. discussed this at p. 8 as follows:

> ¶18 . . . I consider that the trial judge reached his conclusion on apportionment by deciding that the apportionment should be based on an assessment of relative degrees of causation as between the plaintiff as an active causative force at the moment of the injury and the defendant as a passive causative force at the moment of the injury.
>
> ¶19 I think that such an approach to apportionment is wrong in law. The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault.

DECISION

[13] In my view, both sets of defendants are equally at fault. The case at bar concerns a negligently set fire which was allowed to run its full course because the negligence of the renovation group of defendants prior to the onset of the fire failed to prevent this. As stated by Fleming in ***The Law of Torts*** (*supra*), at p. 186:

> Usually, the interaction of several, though independent, causes produces a single indivisible result and the defendant or defendants, if liable at all, will be answerable for the whole of the damage. Their misconduct may have been simultaneous, as when a passenger is crushed in a collision between two negligently driven vehicles; or successive, as where one creates a situation fraught with a hazard which culminates in injury through the intervention of another. . . . If one of them makes good the loss, he may today have recourse against the other for contribution in an amount which the court deems just and equitable, having regard to their share of individual responsibility for the damage. But such eventual contribution among the tortfeasors is a domestic matter between themselves which is no way impairs the plaintiff's claim to full compensation from each.
>
> (emphasis added)

In quoting this with approval, I am cognizant of the fact that the special case assumes that the damages are divisible. This is not determinative of the issue in my view. It does not lead inexorably to the conclusion that the two groups of

defendants are not joint tortfeasors simply because damages can be allocated between them. The stated case has assumed that both groups of defendants were negligent. Had the sprinkler system been installed, there is no doubt that the fire would have been much smaller. Had the candle not been negligently left unattended, there is no doubt that there would have been no fire at all. In my view, there is no distinction between this case and ***Hoffer***, since, in ***Hoffer***, the damages would have been capable of division had the court felt that this was an appropriate course of action to take. Section 5 of the ***Tortfeasors and Contributory Negligence Act***, in my view, does apply.

[14] Thus, to answer the question on the special case, I find the Klassen group of defendants to be 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.

[15] Costs may be spoken to if the parties cannot agree.

J.