PERRIN and PERRIN DU MANITOBA LTD. v. COMMONWEALTH HOLIDAY INNS OF CANADA LIMITED and WINNIHOTEL INVESTMENTS LTD. (Suit No. 382/82)

INDEXED AS: PERRIN et al. v. COMMONWEALTH HOLIDAY INNS OF CANADA LIMITED and WINNIHOTEL INVESTMENTS LTD.

Manitoba Court of Queen's Bench
Kroft, J.
November 21, 1985.

Counsel:
John L. Sinclair, for the plaintiffs;
Michael Werier and Michael Finlayson, for the defendants.

This action was heard before Kroft, J., of the Manitoba Court of Queen's Bench, whose decision was delivered on November 21, 1985.

[1] Kroft, J.: Lou Perrin was, at all material times, the principal officer and effective owner of Perrin Du Manitoba Ltd. He has no claim separate from that of the company and is not a necessary party to these proceedings. When I refer to the plaintiffs in these reasons, I will simply use the name Perrin.

[2] Commencing in 1975, Perrin occupied premises on the mezzanine floor of the Holiday Inn of Winnipeg as a tenant of the defendants and carried on business as a portrait and pictorial photographer. On the afternoon of Sunday, July 6, 1980, a serious fire was set, by an arsonist, on the ninth story of the hotel. Some of the water that was pumped onto the blaze by attending firemen found its way into the Perrin premises and caused damage. In particular, it rendered useless most of Perrin's pictorial negatives (the photo stock) which were in open boxes on a workbench in the studio. Perrin alleges that the damage was caused by the defendants' negligence and that the value of the destroyed negatives was more than $3,500,000.

[3] The particulars of negligence relied on by Perrin are, firstly, that the defendants' employees wrongly failed to warn him that the fire had broken out, thereby depriving him of the opportunity to save the photo stock and, secondly, that the employees failed to take proper care to exclude the arsonist from the premises, notwithstanding that he was a person known

by them to be a risk.

[4] After listening to more than two days of evidence and paying careful attention to the submissions by counsel for Perrin, I am unable to find any evidence or principle of law that would justify imposing liability upon the defendants.

[5] Even had I come to a different conclusion, I would have found it exceedingly difficult to assess Perrin's damages. I can accept that water from the fire hoses substantially destroyed the photo stock and that the resulting loss was real. However, there is little in the evidence which reliably assists in quantifying that loss. Whatever the amount, I am convinced that the allegation that special damages alone exceed three and a half million dollars is without a basis in reality.

[6] The lease that was entered into between the parties contained provisions which, on their face, would appear to exempt the landlords from liability. Perrin's counsel argued that there is an independent action in tort which is not barred by the lease contract. That argument need not be belaboured since counsel for the defendants advised that he was prepared to waive reliance on the exemption clauses of the lease.

[7] The fire was first reported to the fire department by a telephone call from an unidentified person at 3:32 p.m. The firemen arrived on the scene within three or four minutes. None of the staff on the main floor appeared to be aware of what was happening and no alarm bells were heard. Nonetheless, within a few minutes more, the firemen discovered a well-engaged fire burning on the ninth floor. There is no conclusive evidence as to how long it might have been burning but estimates range between five minutes and one-half hour.

[8] Perrin arrived at the hotel at approximately 4:20 p.m., not as a result of any call, but because he was going to his church which was located directly across the street. He saw smoke coming from the hotel and observed that an evacuation operation was underway. Entry through the principal doors of the hotel was barred.

[9] Perrin was able to make his way into his studio by using the overpass which connects the hotel to the neighbouring convention centre. Water had already entered the premises and, according to him, there were several inches on the floor of the finishing room in which the photo stock was located. He did not attempt to retrieve the negatives at that time, because he feared that there might be a risk of electrical shock.

[10] When the open boxes of negatives were finally removed, about two hours later, Perrin found that moisture had come through the ceiling and through the boxes leaving his entire photo stock soggy and sticky. He attempted to dry and separate the negatives but was only able to salvage approximately 200 of 2,600. The entire damaged stock, which has been marked at Exhibit No. 9, is now contained in a paper box approximately 11 inches square and two inches deep.

[11] According to Perrin, if the hotel manager had called him at home at 3:35 p.m. when the fire was first noted, he could have reached the hotel before 4:00 p.m. He would then have been in his studio at least twenty minutes earlier than he actually was. It is the failure to phone and to give notice which according to Perrin's counsel amounted to a breach of duty resulting in a loss of the opportunity to save the negatives.

[12] The suggestion that the manager or anyone else on the staff of the hotel, when faced with a real and imminent danger to the life and safety of guests, had a duty to take time to phone commercial tenants is unreasonable. What is more, there is not a shread of evidence to suggest that had Perrin arrived twenty minutes earlier he could have in any way avoided or altered the result that ensued.

[13] The submission that there was a faulty alarm system which somehow contributed to the delay in warning and therefore to Perrin's loss has no more validity. I heard nothing which persuades me that the alarm system was defective. Further, even assuming a defect, there is no reason to affix blame for the condition of the alarm system on the defendants. In any event, the fire was quite quickly reported and I can find no connection between the condition of the alarm system and the loss suffered by Perrin.

[14] The fact that the fire was started by an arsonist is not denied. Perrin's counsel argued that the arsonist was a person known by the defendants' employees and that in failing to prevent his presence in the hotel, they defaulted in a duty that was owed Perrin.

[15] This argument has no more substance then the others. The employees of the Holiday Inn were aware that the person in question constituted a potential danger. His picture had been posted in staff areas and personnel had been instructed to bar him from the hotel.

[16] There are, though, at least six different means of access into the Holiday Inn. The fact that the arsonist gained entrance cannot be attributed to negligence on the part of the defendants or their employees. It is not as if they knew he was in the hotel and permitted him to remain. There is nothing to support that conclusion. To the contrary, the first person to note his presence and to detain him was a hotel employee. Unfortunately, for all concerned, the apprehension took place after the fire was already underway.

[17] Having found no liability whatsoever upon the defendants, the issue of contributory negligence can be disposed of with dispatch. I will simply observe in passing that if Perrin sincerely believed that his photo stock was as valuable as alleged, then to have left it uninsured and exposed in ordinary open cardboard boxes does, in my opinion, amount to a derelection of his duty to take care of his own property. I do not imply that the "archival" standards suggested by the defendants were necessary. However, to have placed the negatives in appropriate closed containers and to have returned the containers to a drawer of a filing cabinet above floor level does not seem to me to be too much to expect. This kind of care is recommended in the professional photographer's publications to which I was referred.

[18] The fact that two gifted and successful photographers, called on behalf of Perrin, do not take that degree of care is no excuse. The question of what amounts to contributory negligence cannot be decided on the basis of the practice of other experts. It matters not that Perrin followed his usual practice nor that it was the same practice followed by other professional photographers. The issue of contributory negligence is one to be decided by the court and I am satisfied that if a pictorial photographer's negatives are of significant value, then one is entitled to expect a higher standard of care than was demonstrated by Mr. Perrin. (**Anderson v. Chasney and Sisters of St. Joseph**, [1949] 2 W.W.R. 337)

[19] Had I found any liability on the part of the defendants, I would have had extreme difficulty in quantifying the damages.

[20] As observed earlier, while Perrin suffered a real loss, the basis for assessment propounded by his counsel has no validity in the circumstances of this case. What is more, Perrin has provided insufficient evidence to allow any other kind of accurate measurement.

[21] The standard of $1,500. per negative, which Perrin's counsel asked me to use, finds its source in the publications of the American Society of Magazine Photographers and in the American court decisions to which those

publications refer. It is evident that for some years now, American courts and professional photographers have accepted $1,500. as an appropriate amount to be paid by an agent or a customer who loses, damages or wrongfully fails to return a negative. The "delivery memo" commonly used by American photographers has a written provision that when particular negatives or transparencies (slides) are turned over to a client, reimbursement for loss or damage will be determined at a minimum of $1,500.

[22] It is important to note, however, that the $1,500. guideline has been applied to negatives and transparencies with a proven or accepted marketability, that is, to negatives and transparencies that have actually been placed in the hands of customers or agents for use. Further, the literature indicates that the courts, in the precedents cited, had found as a matter of fact that the photographer in question would not have sold the lost or damaged transparencies for less than $1,500. each.

[23] None of the criteria to which I have referred can be said to pertain to Perrin's box of 2,600 damaged negatives.

[24] I do not mean to deprecate Perrin's credentials as a photographer nor the quality of his work. I am, though, not satisfied what degree of selectivity was used, if any, in collecting or retaining negatives. Furthermore, while it would be unfair to prejudice Perrin because his was a fledgling business, there is nothing in the financial statements of his company or other evidence pertaining to the business before the fire or subsequent which helps to establish the marketability of the photo stock on an individual or a collective basis. I am quite satisfied that the American guidelines are of no assistance in evaluating the kind of loss now under review.

[25] Sherman Hines, one of Perrin's expert's is a Canadian pictorial photographer of unquestioned artistic capacity with a well-proven commercial record. He testified that he had a photo stock of some 24,000 pictures of marketable quality in the hands of agents or in his own hands. He expressed the opinion that $1,500. or more was the proper figure to use for specific lost or damaged negatives. However, when questioned by me, he readily acknowledged that he was not suggesting that $36,000,000. ($1,500 x 24,000) was the value of his entire stock.

[26] In ordinary circumstances, lost or damaged property is assessed either on the basis of fair market value or replacement cost.

[27] I realize that original negatives or transparencies are seldom sold. When they are used for the decorative art market, it is prints or reproductions that are sold. When they are used in magazines, annual reports, phamphlets and other kinds of publications, they are leased for a fee. It is, then, the history of sales of proofs or leasing of transparencies that should determine market value.

[28] Regrettably for Perrin, he had no history to present to the court. Before 1979, the focus of the business had been primarily on portrait photography. The pictorial side was in an embryonic stage.

[29] Neither of the experts called by Perrin were of any assistance in determining the market value of Perrin's photo stock. They both vouched for his reputation as a photographer but neither could say anything about the saleability of his work or the success of his business.

[30] Following the fire, and for reasons unrelated to it, Perrin moved to Alberta. He testified that he is doing well there and that he has a new photo stock larger than what was lost. He did not, however, provide any figures which allow me to value the new collection for comparison purposes.

[31] Any attempt to appraise the lost

photo stock on a replacement basis meets with little more success.

[32] One cannot replace a photograph in the sense that you can capture exactly the same image twice. The intrinsic worth of a photograph is in its "impact". That "impact" will depend on all sorts of tangible and intangible circumstances. Even if the same subject matter is available, the resulting image will be different.

[33] I appreciate all these things. However, I am dealing with the lost photo stock in material rather than in artistic terms. New pictures which are similar to those lost can be taken. They won't be identical. They may be worse; they may be better. The fact that Perrin is back in business in the same kind of market with the same kind of subject matter is proof of that fact.

[34] If not for the loss, he would have had a larger stock but I have no reason for concluding that a collection which might have been twice as big would necessarily be twice as valuable.

[35] I do not minimize the expense of building or rebuilding a photo stock. Aside from the cost of equipment and materials, the putting together of a collection embracing a variety of subjects from all parts of Canada must involve many hours of work and many miles of travel. I reviewed the financial statements and tax returns that were tendered to see if actual expenses could be determined but found that they were of no help in determining the actual cost of the photo stock which was lost or the new one with which it was replaced.

[36] The onus to prove damages is on Perrin. I hesitate to say that he has totally failed to discharge the onus but I have concluded that any damage award that might have been given, had there been liability, would have been minimal compared to what was claimed.

[37] I end with a comment about the defendants' argument that Perrin failed to mitigate damages. In view of the findings that I have already made, it is not necessary to dwell on this submission. I do though accept the opinion of the defendants' expert that there are ways of separating wet, sticky negatives and of minimizing loss. I am somewhat uncertain as to how readily available these means were to Perrin. Nonetheless, he is an experienced photographer and if the photo stock truly had a multimillion dollar value then it seems to me that the means employed to separate and dry the negatives was rather crude.

[38] The plaintiffs' action is dismissed. The costs will follow the result and the parties may make submissions if they cannot agree on the amount.

Action dismissed.