Case Name:

Mohamed v. Banville

Between
Showkatali "Sam" Mohamed, Plaintiff, and
Mark Banville and Dianne Borrow, Defendants

[2009] O.J. No. 712

Court File No. 03-CV-260088CM2

Ontario Superior Court of Justice

A.J. O'Marra J.

Heard: January 23, 2009.
Judgment: February 20, 2009.

(48 paras.)

Tort law -- Negligence -- Causation -- Strict liability (Rule in Ryland v. Fletcher) -- Fire -- Dangerous things and situation -- Fire -- Motion by defendants tenants to dismiss landlord's action in negligence and strict liability allowed -- Landlord failed to establish with certainty fire that broke out in premises, destroying them, was caused by careless smoking -- No smoking materials found in vicinity of fire's origin -- Facts that tenant was drunk and was smoker and was passed out near origin of fire not enough to establish negligence -- Fire considered accidental, barring strict liability claim -- Fire Prevention and Protection Act, 1997, s. 76.

Tort law -- Nuisance -- Defences -- Motion by defendants tenants to dismiss landlord's action in nuisance allowed -- Landlord failed to establish with certainty fire that broke out in premises, destroying them, was caused by careless smoking -- Fire considered accidental, barring nuisance claim.

Motion by Banville and Borrow for an order dismissing Mohammed's action against them as disclosing no genuine issue for trial. Banville and Borrow rented a unit in a home owned by Mohammed. The home completely burned to the ground one night. The cause of the fire was likely careless smoking but other possible causes could not be completely ruled out. Banville was drunk the night of the fire and had borrowed cigarettes from another tenant prior to falling asleep on his couch. No smoking materials were found close to the couch. The fire started in the unit Banville and Borrow rented. Other tenants managed to escape although Banville and another tenant were injured. Mo-

hammed settled his property damage claim through his insurer. His insurer brought a subrogated action to recover $150,000 for damages to Mohammed's property against Banville and Borrow. Negligence was the original claim, but after pleadings closed, the claim was amended to include the tort of nuisance and strict liability.

HELD: Motion allowed. The action was dismissed. The facts that Banville was a smoker, was drunk, and was passed out on the couch shortly before the fire occurred were insufficient to establish negligence. The presence of smoking materials proximate to the origin of the fire was necessary. Without establishing with certainty the cause of the fire, Mohammed's claims in nuisance and strict liability were barred. The fire had to be considered accidental.

Statutes, Regulations and Rules Cited:

Fire Prevention and Protection Act, 1997, S.O. 1997, c. 4, s. 76

Ontario Rules of Civil Procedure, Rule 20.04

Counsel:

Edmund Kent, for the Plaintiff.

Martin Forget, for the Defendants.

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1 **A.J. O'MARRA J.**:-- Mark Banville and Dianne Borrow, defendants in the action, seek an order of this court under Rule 20.04 of the Rules of Civil Procedure to dismiss the claim against them on the basis that there is no genuine issue for trial as to their liability in negligence, nuisance, or strict liability on the principle of *Ryland v. Fletcher*.

2 The action against the defendants arises out of a fire that started at their residence 135 Isabella Street, Parry Sound on June 20, 2002 and spread causing extensive damage to the neighbouring premises, 133 Isabella Street, owned by the plaintiff, Showkatali Mohamed. The plaintiff settled his property damage claim through his insurer, Gore Mutual. The insurer then brought a subrogated action to recover the sum of $150,000.00 for damages to the plaintiff's property against the defendants.

3 The plaintiff's statement of claim originally alleged that the negligence of the defendants caused the fire and damages, however, after pleadings were noted closed the plaintiff amended its claim to include the tort of nuisance and strict liability on the principle of *Ryland v. Fletcher*.

Facts

4 The defendants, Banville and Borrow lived in a common law relationship at 135 Isabella Street, Parry Sound. On June 20th, 2002, after returning home from work Mr. Banville went out for the evening. Initially, he attended at his brother-in-law's home and then later at a nearby tavern. He consumed alcohol at both locations. In his affidavit, sworn August 10, 2008, and in cross-examination on November 20, 2008, by his own characterization, he returned home at approximately 1:00 a.m. in an intoxicated state.

5 Mr. Banville, who smokes cigarettes, states that he had run out of cigarettes by the time he had returned home. In search of cigarettes, he spoke to one of the tenants who lived in the plaintiff's residence, Mr. Howard Barlow to ask if he had any cigarettes to give to him. Mr. Barlow told him he did not have any and could not accommodate him.

6 Mr. Banville, in his affidavit and in his cross-examination upon his affidavit indicated that he returned to his living room where he turned on his stereo to listen to music, turned off the lights and fell asleep on his couch. The stereo would turn off when the CD finished playing. Frequently he would fall asleep at night on the couch. The couch he slept on was located against the west wall of the living room directly across from the stereo and television set situated along the east wall of the room.

7 The next awareness Mr. Banville had that night was been awakened by the sound of the smoke detector and the smell of smoke. The room was still in darkness and he could not see the smoke. The couch Mr. Banville was lying on was neither hot nor ignited in flame. He did not see any flame in the room at the time.

8 However, realizing that there was a fire he first ran upstairs to alert Ms. Barrow to ensure her escape. Unknown to Mr. Banville at the time Ms Borrow had left the home earlier that evening having decided to spend the night at her sister's. Finding that Miss Borrow was not in the house, Mr. Banville then ran out of the house to rouse the tenants who lived at the plaintiff's house next door.

9 Initially, he alerted a couple named Mark and Sandra who occupied the front ground floor apartment of the house. Then he ran to the back of the residence and up the back stairs to Mr. Barlow's apartment on the second floor. By the time he was at the back of the property, he saw flames coming out of the back of his house and burning up to the soffits of his neighbour's house which was only a few feet distance from his house.

10 Mr. Banville climbed the stairs to Mr. Barlow's apartment and broke down the door in order to enter the apartment to alert Mr. Barlow to the danger. By the time the two men had returned to the door to escape the flames had consumed the deck at the top of the stairs. They were forced to flee through a second story window. In the process both men were injured and required medical treatment. Mr. Banville suffered a laceration to his arm in the process of breaking the window and Mr. Barlow was injured due to his fall from the second floor window.

11 The police and fire fighters were on the scene by the time Mr. Banville had arrived at the front of the house with Mr. Barlow. Mr. Banville was taken to the hospital by police for treatment and released from the hospital later that morning.

12 The defendants' home burned to the ground with the exception of a part wall left standing at the front of the house. The Fire Marshall's office conducted a scene investigation on June 20, 2002. The investigation did not reveal the cause of the fire.

13 The next day the plaintiff's insurer retained Mr. Rene Caskanette, a professional engineer, to investigate the fire scene. He concluded that the most probable cause of fire was as a result of careless smoking although other causes such as electrical failure or arson could not be eliminated. Although, he considered causes other than careless smoking as being improbable.

Position of the Parties

14 The plaintiff's claim in negligence against the defendants is grounded in the report and opinion of Mr. Caskanette. Mr. Caskanette opined in his report that the "most probable ignition scenario is

careless disposal of smoker's materials in the upholstered couch at the west end of the living room". He states in his conclusions:

> The most probable ignition scenario is careless disposal of smoker materials in the upholstered couch by the homeowner. While other causes such as electrical failure or arson cannot be eliminated we have found no evidence to support these and consider them improbable.

15 The facts he claims that support the careless smoking ignition scenario is that the owner is a smoker, he was impaired, he was asleep on the couch, he had been home for one and a half hours at the time the fire developed, he reported the house full of smoke when he discovered the fire, the total destruction of the combustible components of the couch, and the extensive top down burning of the floor joists below the couch while other joists throughout the living room were burned from the bottom up.

16 There was no evidence of smoker's materials being found in the area of the couch.

17 The position of the defendants is that the evidence available and provided by the plaintiff fails to meet the criteria necessary to prove not only negligence but the cause of the fire. Contrary to Mr. Caskanette's opinion, the defendants assert there is no evidence of smoking having occurred prior to the fire starting and no evidence of smoker materials having been located in the area of the purported origin of the fire. Without evidence of smoking or careless smoking the requirements to prove negligence have not been met. Moreover, the defendants contend that without evidence of the cause of the fire s. 76 of the *Fire Prevention and Protection Act*, 1997, S.O. 1997, c. 4 applies to bar the plaintiff's action. Section 76 reads as follows:

> No action shall be brought against any person in whose house or building or on whose land any fire accidentally begins nor shall any recompense be made by that person for any damage suffered thereby ...

18 Relying on the Court of Appeal decision in *Neff v. St. Catharines Marina Ltd.* (1998), O.R. (3d) 489 a fire will be deemed "accidental" if it cannot be traced to a particular cause on a balance of probabilities. In this case, the investigation of the Fire Marshall's office did not determine a cause of fire, and the plaintiff's expert's opinion is based only on an assumption that Mr. Banville had been smoking after he arrived home, contrary to the uncontroverted evidence of the defendant.

Issues

1. Is there a genuine issue for trial with respect to the claims of negligence, nuisance or strict liability on the principle of *Ryland v. Fletcher*?
2. Are the plaintiff's claims statute barred by the operation of s. 76 of the *Fire Prevention and Protection Act*, 1997?

General Principles

19 Rule 20.04 provides that summary judgment is to be granted where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence. Its general purpose, as noted in *Dawson* v. *Rex Craft Storage and Warehouse Inc.*, [1998] O.J. No. 3240 is to "weed out cases at the pre-trial stage when it can be demonstrated clearly that a trial is unnecessary". The summary judgment motion's court is to determine whether there is a genuine issue for trial. In the oft cited passage

from *Irving Ungerman Limited v. Galanais* (1991), 4 O.R. (3d) 545 (C.A.) Morden ACJO discusses the meaning of the phrase "genuine issue for trial":

> It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists.

20 A fact is "material" if the result of the proceeding turns on its existence or non-existence. In *Ungerman* the Court of Appeal makes clear that the judge on a summary judgment motion is only to determine whether a genuine issue exists about a material fact. Once it is determined that a material fact is in dispute it is not for the motion's court judge to resolve. It is a matter for the trier of fact at trial to resolve. However, a motion's court judge is required to take a hard look at the evidence in determining whether there is or is not a genuine issue for trial. See: *Pizza Pizza Ltd. v. Gilespie* (1990), 75 O.R. (2d) 225 and *1061590 Ontario Ltd. v. Ontario Jockey Club*, [1995] O.J. No. 132 (C.A.).

21 The moving party bears the legal or persuasive burden to satisfy the court that there is no genuine issue for trial, whereas the responding party has an evidentiary burden to respond with evidence setting out "specific facts" showing that there is a genuine issue for trial. See: *Dawson v. Rex Craft, Ungerman and Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33 (C.A.). These respective burdens are described in *Lang v. Kligerman*, [1998] O.J. No. 3708 (C.A.) at para. 9:

> The authorities are clear that the onus is on the moving party to establish that there is no genuine issue for trial with respect to a claim or defence. There is no onus on the responding party. However, where the evidence presented by the moving party prima facie establishes that there is no genuine issue for trial, and the moving party is entitled to summary judgment as a matter of law, to preclude the granting of summary judgment the responding party assumes the evidentiary burden of presenting evidence which is capable of supporting the position advanced by the responding party in its pleading. On the basis of this evidence, when considered with all the evidence before the motion's judge, it will then be for the motion's judge to determine whether the evidentiary record raises a genuine issue for trial.

22 The responding party may not rest on unsupported allegations but must "lead trump or risk losing". As noted in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R 425 the responding party must establish that the claim has a "real chance of success".

23 On the motion the judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial. See: *Dawson v. Rex Craft,* and *Royal Bank v. Feldman,* [1995] O.J. No. 1598 (Ont. Div.).

24 In examining the evidence the court is not to assess credibility, weigh evidence, find facts or make factual inferences, all of which are functions reserved for the trier of fact. See: *Aguonie v.*

Galion Solid Waste Materials Inc., [1998] O.J. No. 459. Although, in *Select Acoustic Supply Inc. v. College of Physicians and Surgeons of Ontario,* [2008] O.J. No. 2163 the Ontario Divisional Court observed at para. 14 that recent decisions of the Court of Appeal in *Baldwin v. Daubney*, [2006] O.J. No. 3824 (CA) and *Goldman v. Devine,* [2007] O.J. No. 1491 suggest that the Court has stepped back from the rigid application of the principle that the motions judge is not to weigh or assess the credibility of the parties' positions and their evidence.

The Negligence Claim

25 In *Kreutner v. Waterloo Oxford Co-operative Inc.*, [2000] O.J. No. 3031 (C.A.) Borins J.A. observed at para. 7 that in a claim of negligence as in any other cause of action the responding party to a motion for summary judgment must adduce evidence to support the requirements of the cause of action alleged, failing which the motion for summary judgment must be granted. See also *Hiebert v. Lennox Canada Inc.*, [2007] O.J. No. 3079 (SCJ).

26 The defendants rely on *Kreutner* for the proposition that the plaintiff's must adduce evidence, specific facts to support the requirements of their claim in negligence. In cases where smoking was alleged to have been the cause of the fire the plaintiffs were required to establish that the defendant was smoking cigarettes just prior to the fire and that there was evidence of careless smoking.

27 In *Dudzinski v. Coles*, [1988] O.J. No. 1582 (Dist. Ct.), a case similar to the circumstances of this case, the issue for the court to determine was what started the fire, and whether the fire was caused by the negligence of the defendant's smoking. A fire consumed the defendant's apartment. A senior officer with the fire department, named Wishart with more than 31 years experience investigating fires, concluded the fire started in a chair and had been started by the careless disposal of "smoker's materials". It was his opinion the fire had started in the corner of a room in the area of an upholstered chair that had been completely consumed by fire. In cross-examination he acknowledged that it was possible that there was another origin for the fire such as faulty wiring, although there was no evidence of it. Further, he acknowledged that no smoker's materials, such as matches or cigarette butts or ashes were found at the site where he said the fire started.

28 The defendant indicated that he was not home at the time of the fire and he did not smoke. However, others who had been in the apartment for about a week prior to the fire were smokers. In commenting on the expert evidence in that case the court said the following:

> In the case at hand, while the witness Wishart concluded that the fire had its origin in the upholstered chair and was caused by careless smoking or the use of smoking utensils, there was no evidence to substantiate this conclusion. There were no charred matches or cigarette butts, ashes or the like located in or near the origin of the fire. There was no evidence that anybody was smoking in the vicinity of the fire prior to its outbreak.
>
> The onus is upon the plaintiff to establish negligence. ... In my opinion the plaintiffs have failed to prove by way of specific evidence that the defendant or the other occupants were negligent in any respect.

29 In the absence of evidence of smoking, such as the presence of smoker materials, in the vicinity of the alleged origin of fire negligence could not be established.

30 Similarly, in *D'Antimo v. McEneny*, [1999] O.J. No. 3298 (SCJ) a case where the plaintiff alleged the defendant left a cigarette burning on a chair in his apartment which caused extensive fire damage Fleury J. held that in the absence of any smoking in the time preceding the fire the defendant could not be seen as negligently having caused the fire. In that case, although there was evidence that the defendant had been smoking a cigarette while sitting on the couch where the fire was said to have originated there was no evidence to suggest that she handled her cigarette carelessly. As a result, the claim of negligence failed.

31 In *Steer v. Hore*, [1990] B.C.J. No. 519 (B.C.S.C.) the plaintiff landlord alleged the tenants had caused a fire by smoking carelessly on their apartment balcony. Although a wallet and cigarette butts were found on the balcony where the fire had originated, the action was nonetheless dismissed as the plaintiff had adduced no evidence the plaintiffs had smoked on the balcony on the evening the fire occurred or had failed to properly extinguish smoker's materials.

32 In *Wong v. Mislang*, [2007] B.C.J. No. 2708 (B.C.S.C.) the plaintiffs alleged that their neighbours had caused a fire by discarding a cigarette on a sofa that had been stored in their car port. Even though there were cigarette butts found on the car port floor, the action was dismissed because there was no evidence that the defendants had been smoking in the car port the night of the fire.

33 In cases where negligence was established with respect to fires caused by careless smoking the defendant's liability was established when there was evidence of the defendants having been smoking prior to falling asleep and waking to find the sofa or bed upon which they were lying on fire. See: *Iversen v. Purser*, [1990] B.C.J. No. 2000 (BCSC) and *Kinsman Club of Kingston v. Walker Estate*, [2005] O.J. No. 4622 (SCJ).

34 In reviewing these cases, I am satisfied that the requirements necessary to establish negligence where careless smoking is alleged to have caused the fire that at a minimum there must be evidence of smoking having occurred proximate to the time and place or area of the origin of the fire.

35 The specific facts that the plaintiff relies on in this case to establish liability are the "facts" relied on by Mr. Caskanette to find support for his conclusion as to the most probable source of ignition and origin of the fire. Those facts are that Mr. Banville is a smoker, he was intoxicated, and he was at home asleep on the couch when the fire broke out. While they may be facts they do not meet the requirements necessary to establish negligence.

36 While I am not permitted to assess or to weigh the evidence I must be satisfied that there is evidence to support the requirements of the cause of action as noted by Borins J. in *Kneutner*. I must assume that the complete record is before me as the parties would rely on at trial. I must assume that the "best foot" has been put forward to show that there is a real chance of success. In this case, there is no evidence that Mr. Banville was smoking at home after he arrived back from his evening out. Without evidence of smoking proximate to the time and place where the fire is said to have originated or that there was careless smoking the requirements necessary to prove negligence have not been met. There is no evidence of the source of ignition. There is no evidence of smoker's materials having been found which would indicate that smoking occurred in the vicinity of the area purported to have been the origin of the fire.

37 The plaintiff argues that the cause of fire is a material fact in dispute and that Mr. Caskanette's opinion is evidence that meets the requirements necessary to establish negligence. He submits that Mr. Caskanette reasonably infers, as would a trier of fact, that Mr. Banville, a smoker who was in-

toxicated, started the fire as a result of careless smoking when he fell asleep. In my view, the plaintiff seeks to rely on an opinion based on assumption and syllogistic reasoning: because some fires result from the careless smoking of smokers who fall asleep, in the absence of any other cause of the fire, if a fire starts in a smoker's home where the smoker fell asleep it occurred because of careless smoking.

38 In this case, just as there is no evidence the fire started due to an electrical fault or arson, there is no evidence it was started by careless smoking, even if the fire originated in the area where Banville fell asleep.

39 In the result, I am satisfied in the absence of evidence of smoking or careless smoking proximate to the time and purported origin of the fire the plaintiff does not have the evidence necessary to support the claim of negligence. The plaintiff is not in a position to establish the source of ignition that started the fire. An essential requirement necessary to establish negligence is lacking. The speculative opinion of Mr. Caskanette based on assumption is insufficient.

40 The plaintiff contends that there is a genuine issue for trial with respect to the defendant Banville's credibility. In my view that assertion must fail as well because Banville's credibility is not in issue. Banville's credibility could only become an issue if the plaintiff was able to adduce evidence that contradicts his evidence he had not been smoking at home that night.

41 Insofar as Ms. Borrow is concerned she was not home at the time of the fire. Even if the requirements necessary to establish a cause of action against Banville could be found in Caskenette's opinion there is no evidence or genuine issue for trial with respect to Ms. Borrow.

42 This is a case where it has been clearly demonstrated that a trial is not necessary. The Court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial. Without adducing the evidence necessary to establish the requirements of the cause of action alleged there is no genuine issue for trial and summary judgment must be granted.

The Claims of Nuisance and Strict Liability:

43 Nuisance has been defined as "an unreasonable interference with the use and enjoyment of land" by Allan Linden, Canadian Tort Law, 7th Edition (Markham, Ont; Buttersworth, 2001) at p. 525. Generally, nuisance does not apply to singular cases of fire damage but rather has been restricted to holding defendants liable for continuing disturbances caused by their use of land. Such cases have included situations where chemicals were emitted from the defendant's foundry causing damage to the paint on vehicles and the plaintiff's yard, where salt on roads contaminated well water causing the loss of nursery stock, or where defendant's driving trucks on dirt road damaged a house and made it impossible to cultivate land. It has also been found in situations where a piggery or mushroom farm emitted offensive odors, where dust from a saw-mill or noise from a go-kart club interfered with the use and enjoyment of the plaintiff's property.

44 The plaintiff however, relies on *Kinsmen Club of Kingston* where Power J. found that one incident of careless smoking that caused a fire could constitute actionable nuisance. However, in that case nuisance was established where the fire was found to have started as a result of the deceased smoking in bed. At paragraph 30 he stated the following:

> In my opinion, a tenant of an apartment building who smokes in bed actively creates a nuisance given the notorious risks attached to this activity. Injury to others

> is very foreseeable and this risk was, according to the evidence, appreciated by Ms. Walker (the deceased).

45 The court found in part, based on statements attributed to the deceased after the fire, she had caused the fire by smoking in bed. She had told the deputy fire chief at the scene that "she had fallen asleep while smoking and woke to find her comforter on fire". She had also told another fire official "I guess I started the fire". The court concluded that s. 76 of the *Fire Prevention and Protection Act*, 1997 did not apply in the circumstances because the "accidental" fire was one which had its origins in the deceased's negligence.

46 However, such is not the case in this instance. The plaintiff does not have evidence that smoking or careless smoking caused the fire. Without establishing the cause of the fire, it is an "accidental" fire and the action against the defendants in nuisance is statute barred by virtue of the, s. 76.

47 With respect to the claim under the rule established in *Rylands v. Fletcher* (1868), LR 3 HL 330 strict liability will be imposed if two elements are present: a) a non-natural use of land, and b) an escape. In *Kinsmen Club of Kingston* the court observed that smoking in bed, while inadvisable cannot be considered a non-natural use of fire. I agree. On that basis, the first requirement under the rule has not been met by the plaintiff. Moreover, as with the claims in negligence and nuisance there being no evidence to establish the cause of fire, the claim for strict liability against the defendants is barred by the operation of s. 76 of the *Fire Prevention and Protection Act*, 1997 as well.

48 In the result, for the reasons above, the defendants' motion for summary judgment is granted. Costs are awarded against the plaintiff. If the parties are unable to agree as to costs they may make written submissions of no more than two pages in length together with a draft cost outline within 30 days of the date of this judgment.

A.J. O'MARRA J.

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