Case Name:

Ouderkirk v. Clarry

Between
Laura Ouderkirk, Appellant, and
Ronald Bruce Clarry, Respondent

[2010] O.J. No. 2223

2010 ONCA 388

Docket: C48989

Ontario Court of Appeal
Toronto, Ontario

K.N. Feldman, R.P. Armstrong and G.J. Epstein JJ.A.

Heard: November 17, 2009.
Judgment: May 28, 2010.

(37 paras.)

Tort law -- Negligence -- Contributory negligence -- Plaintiff's knowledge of danger -- Dangerous premises or equipment -- Appeal by plaintiff from dismissal of action dismissed -- Plaintiff fell from newly constructed deck at defendant's home and broke her ankle -- Deck had no railing or permanent steps and was not built to code -- Jury found that defendant took reasonable steps to ensure plaintiff's safety and plaintiff failed to sufficiently ensure her own safety -- Jury's findings were not perverse, as there was evidence of a warning by defendant to plaintiff to be careful, installation of visible temporary stairs and adequate lighting.

Appeal by the plaintiff, Ouderkirk, from the dismissal of her action against the defendant, Clarry. The plaintiff attended a bonfire party held at the defendant's property. Shortly after arrival, she fell from a deck at the rear of the home and broke her ankle. She contended that the injury exacerbated her pre-existing depression, resulting in a suicide attempt. Construction of the deck was completed on the evening of the party. The deck was a flat surface 31 inches above the ground and did not have a railing. The defendant never obtained a building permit and the deck did not comply with the Ontario Building Code. The plaintiff sued the defendant for negligence. She testified that it was dusk and she could see the edge of the deck. She stated that she stepped off the edge of the deck expecting to meet a step or the ground. She testified that she was given no warning about the drop.

The defendant testified that he informed the plaintiff that he had just finished building the base on the deck and warned her of the absence of a railing. His testimony was inconsistent with his examination for discovery conducted five years earlier. The defendant's daughter corroborated his testimony regarding the warning given to the plaintiff. Further issues included the sufficiency of lighting on the deck, whether temporary stairs were attached to the deck, and whether the plaintiff was advised to use the stairs. A judge and jury dismissed the plaintiff's action. The jury found that the defendant did not fail to take reasonable care to ensure the plaintiff's safety. The jury also found that the plaintiff failed to take reasonable care to ensure her own safety by paying close attention to her footing in an unfamiliar environment. Provisional damages were assessed at $30,000 in general damages and approximately $10,000 in lost income. The plaintiff appealed on the basis that the jury's verdict on liability and damages was perverse and the judge erred in admitting photographs of the deck taken just prior to trial.

HELD: Appeal dismissed. The jury's verdict on liability was not perverse. There was evidence that the defendant took reasonable steps to ensure the plaintiff's safety through lighting, installation of visible temporary stairs, and the warning to be careful due to absence of a railing. The jury accepted the defendant's evidence and gave clear answers on the questions related to liability. The jury's verdict on damages was not perverse, as it was entitled to reject the evidence supporting the plaintiff's position. No objection was made to the instruction on damages. No error was made in admitting defence photographs taken just prior to trial, as the jury was carefully instructed on the limited conclusions that could be drawn from the photographs.

Appeal From:

On appeal from the judgment of Justice Ruth Mesbur of the Superior Court of Justice, sitting with a jury, dated May 30, 2008.

Counsel:

H.M. Lewin and Daniel Michaelson, for the appellant.

Martin Forget, for the respondent.

The judgment of the Court was delivered by

1 R.P. ARMSTRONG J.A.:-- The appellant, Laura Ouderkirk, attended a bonfire party at the property of the respondent, Ronald Clarry, on May 11, 2002 in Sunderland, Ontario. Shortly after arriving at the party, she fell from a deck at the rear of the respondent's house and suffered a broken ankle and related injuries. She sued the respondent in negligence for her injuries. After a 10-day jury trial before Justice Ruth Mesbur of the Superior Court of Justice and a jury, the appellant's action for damages was dismissed. The appellant now appeals the dismissal of her action.

BACKGROUND

(i) The Accident

2 The respondent and a friend built a deck at the rear of the respondent's house located on a 143 acre property in Sunderland, Ontario. The deck consisted of a flat surface that was 31 inches above the ground. The respondent did not obtain a building permit and the deck did not comply with the Ontario Building Code. In particular, the deck did not have a railing, which the building code required for any deck over 23 and 5/8 inches high.

3 The deck was completed in the afternoon of May 11, 2002. A bonfire party at the property was planned for that evening. The respondent called his friend, the appellant, and invited her to attend the party. The respondent and another friend went to the appellant's house to pick her up and take her to the party.

4 The appellant testified that after arriving at the respondent's house, he suggested she grab two beers for them and check out the new deck before meeting the other guests at the site of the bonfire. The appellant walked out to the deck. In cross-examination, she said it was dusk and she could see the edge of the deck. She proceeded to step off the edge of the deck where she expected to meet a step or the ground. Unfortunately, she fell to the ground and fractured her ankle and injured her lower back. She testified that she was given no warning about a drop from the deck to the ground and that there was no safety railing at the edge of the deck. She saw no stairs from the deck to the ground.

5 The respondent had a slightly different version of events. When they arrived at the respondent's house, he said that the appellant took two bottles of beer from the refrigerator and made her way through the sliding door to the deck. The respondent testified as follows:

> I said to Laurie -- I said, "Grab a couple beer for us, and, uh, we'll go out to the bonfire." I said, in the meantime, "check out my deck. It's just the base I finished, and I said be careful, there's no railing."

6 When the respondent was examined for discovery five years before trial, he did not refer to his having warned the appellant about the lack of a railing. On July 14, 2003, (a little more than a year after the accident), he testified on discovery as follows:

> I said to Laurie -- I said, "Grab a couple beer and we'll go out to see the tenants at the bonfire." I said, in the meantime, "check out my deck".

He also testified on discovery that there were no stairs for the deck at the time of the party. However, at trial, he said that he had installed a set of temporary stairs prior to the party, which he intended to replace with more permanent stairs.

7 The respondent's daughter, Rhonda Clarry, testified that she heard her father tell the appellant to go and look at the deck, to be careful because there was no railing and to use the stairs. She also testified that she gave the appellant the same warning and told her to use the stairs. In 2005, Rhonda Clarry gave a statement to the respondent's lawyer concerning her potential evidence. She did not mention in that statement that there were stairs in place at the time of the accident, nor did she say that her father told the appellant to use the stairs.

8 There was an issue at trial as to whether, at the time of the accident, there were any stairs attached to the deck. The appellant said she saw no stairs. The respondent's daughter and several others who attended the party testified that the temporary stairs were installed and attached to the deck.

9 There was also an issue as to the lighting of the deck. The appellant said the grass looked dark. The respondent and others who testified said that there was ample lighting on the deck provided by a floodlight on the back of the garage, lighting from inside the house and light from the bonfire, which was about 20 to 25 feet from the deck and which lit up the whole side of the house.

10 The respondent installed a temporary safety railing on the deck some months after the accident for his annual pig roast in the second week of September 2002. In cross-examination, he agreed the deck was not safe without a railing when he was going to have 80 to 120 people at the pig roast.

(ii) The Appellant's Injuries

11 The appellant was taken to hospital by ambulance. Her distal tibia and fibula were broken in several places. Treatment involved surgery and the insertion of two plates and 17 screws to stabilize the fractured bones. The appellant was in a cast for four months. There was a second surgery to remove the hardware. The evidence from two orthopaedic surgeons was that there was a 10 to 15 per cent risk of post-traumatic arthritis. At the time of the trial (six years after the accident), the appellant still had soreness in her ankle and back pain.

12 Two weeks after the accident, the appellant attempted suicide. She attributed the attempt to substantial pain and immobility, which exacerbated pre-existing depression related to the death of her only child, which occurred prior to the accident.

13 The appellant returned to full-time work in January 2003.

(iii) The Jury's Verdict

14 The jury's verdict on liability was contained in the answers to the following questions:

> (1) Did Ronald Clarry fail to take reasonable care in all the circumstances to ensure that Laura Ouderkirk was reasonably safe while on Mr. Clarry's premises on May 11, 2002?
>
> A. No
>
> (2) If your answer to question 1 is "yes", please provide particulars:
>
> Not answered.
>
> (3) Did Ms. Ouderkirk fail to take reasonable care for her own safety on May 11, 2002?
>
> A. Yes.
>
> (4) If your answer to question 3 is "yes", please provide the particulars:
>
> We would expect that reasonable care would involve paying close attention to one's footing in an unfamiliar environment.

15 The jury assessed the appellant's general damages for pain and suffering at $30,000. The jury found that 50 per cent of the appellant's lost income of $20,363.00 and two-thirds of the appellant's out-of-pocket expenses of $660.00 were caused by her injuries.

THE APPEAL

16 The appellant raises the following grounds of appeal:

(i) the jury's verdict on liability is perverse;
(ii) the jury's verdict on damages is perverse; and
(iii) the trial judge erred in admitting three defence photo-graphs of the deck taken a few days before trial.

ANALYSIS

17 The test for setting aside a jury's verdict was succinctly articulated by Chief Justice Duff some 73 years ago in *McCannell v. McLean*, [1937] S.C.R. 341 at 343:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

18 In defining the test, Chief Justice Duff also referred to the cautionary language of Lord Wright in *Mechanical and General Inventions Co. Ltd. and Lehwess v. Austin* [1935] A.C. 346 (H.L.) at 375:

> Lord Halsbury in these valuable observations is, I think, going back to the test applied in Wood v. Gunston (1655) Style, 466), which was whether there was a miscarriage of the jury. Thus the question in truth is not whether the verdict appears to the appellate court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

19 More recently, my colleague, Feldman J.A., cited Chief Justice Duff's test in *McCannell* and observed: "Consequently, it is relatively rare for a jury verdict in a civil case to be overturned on appeal". See *Bovingdon v. Hergott* (2008), 88 O.R. (3d) 641 at 649.

20 In *Kerr v. Loblaws Inc.* (2007), 224 O.A.C. 56 at para. 53, Cronk J.A., writing for the court, concluded that since "there was an evidentiary base to support the jury's verdict on liability", she could not conclude that "the jury's verdict on liability is either plainly unreasonable or unjust".

(i) Is the jury's verdict on liability perverse?

21 Counsel for the appellant submits that the jury's verdict is perverse in light of the uncontroverted evidence that the respondent built a deck without a building permit and without a railing in contravention of the Ontario Building Code. Counsel further submits that the evidence clearly established that the deck was unsafe by reason of the failure of the respondent to install the required railing, which was the cause of the appellant's fall and resulting injuries. For the jury to conclude

that the respondent did not fail to take care to insure that the appellant was reasonably safe while on his premises is a perverse conclusion.

22 Counsel for the appellant also argues that the verdict is perverse because the jury's answers to the questions are vague and indicate a failure to follow the trial judge's instructions. Counsel points out that the trial judge told the jury that if their answer to question 1 was "no", *i.e.* that the respondent did take reasonable care in the circumstances, then there would be no need to answer any other question on liability. The jury did not follow that instruction since they went on to answer the third and fourth questions concerning the appellant's failure to take reasonable care for her own safety.

23 I do not accept the submissions of the appellant. I do agree that absent the evidence of the respondent and his daughter, that he expressly warned the appellant as she went out to the deck to be careful as there was no railing, this was a strong case for the appellant. The respondent and his daughter were challenged on that evidence. The respondent's evidence on discovery, which did not refer to the warning, was highlighted on cross-examination. Similarly, the daughter's failure to refer to the warning in her statement to the lawyer was highlighted on cross-examination. The jury might have disbelieved the respondent or at least might not have been persuaded on a balance of probabilities that he warned the appellant. However, it appears that the jury was satisfied on a balance of probabilities that the warning was given.

24 There was evidence that supported the position of the respondent that he did not fail to take reasonable measures to ensure the appellant's safety:

- there was lighting, which reached the deck from the inside of the house, the back of the garage and the bonfire which was about 20 to 25 feet from the deck;
- the respondent had installed a temporary set of stairs to allow for access to and from the deck prior to the party; and
- the appellant was warned that there was no railing on the deck and to be careful.

25 The respondent's case was also assisted by the following evidence:

- the appellant was told by the respondent's daughter to use the stairs which were plainly visible;
- the appellant admitted seeing the edge of the deck and being aware of the lack of a railing; and
- the appellant told Rhonda Clarry and another witness right after her fall that she felt really stupid and that the accident was her fault. She made a similar statement to the respondent.

26 In my view, the jury must have accepted the evidence of the respondent in respect of the crucial issue of the warning, which provided a basis with the other defence evidence for the jury to answer the first question in the affirmative.

27 I also note that there were credibility issues concerning the evidence of the appellant. She appears to have exaggerated the effect of her injuries on her mobility. She told a doctor for the defence that she used a wheelchair for four months while her treating surgeon testified that she was able to use crutches on her discharge from the hospital two weeks after the accident. He also testified that

her injured leg was capable of full weight bearing after two months. In reply evidence, the appellant testified that she used the wheelchair to carry a hot water bottle of tea but otherwise used her crutches. The appellant also applied to extend her disability insurance coverage on January 8, 2003 at a time when she was already working full-time. It was open to the jury to take these credibility issues into consideration when considering her evidence.

28 I turn to the jury's answer to the questions on liability. I do not find the answers to these questions to be vague such that they lead to a conclusion that the verdict is perverse. While the jury did not follow the trial judge's instructions concerning questions 3 and 4 on contributory negligence, there is nothing in the answers that conflicts with the answer to question 1.

29 For the above reasons, I cannot conclude that the jury's verdict on liability is perverse.

(ii) Is the jury's verdict on damages perverse?

30 Counsel for the appellant submitted to the jury that the appropriate range for general damages was $60,000 to $90,000. The range submitted by counsel for the appellant was based on the appellant's significant ankle fracture that included two surgeries, a four-month recovery period, physiotherapy, ongoing pain and a future risk of arthritis. Counsel also submits that the jury perversely ignored the appellant's pre-existing depression, which was exacerbated by the accident and resulted in a suicide attempt. Counsel submits to this court that $30,000 general damages is inordinately low and beyond the range of what is reasonable.

31 Counsel for the respondent submitted that the appropriate range for general damages was $30,000 to $40,000. Counsel for the respondent submits that the medical records establish that the appellant suffered an ankle fracture that healed without complication and allowed her to return to her pre-accident activities within a few months. He submits to this court that the assessment of $30,000 is consistent with the assessment of damages for similar injuries.

32 The trial judge, in her charge to the jury on general damages, instructed the jury as follows:

> If you are satisfied that the loss claimed by the plaintiff has been proven as described by counsel for the plaintiff, then I would suggest that you might see fit to award damages in the lower end of his range. He described Ms. Ouderkirk's injuries to you as a reasonably severe ankle injury, minor aggravation of her back, and major aggravation of her depression, preventing her from returning to work. He suggested her inability to manage the pain from the break was the reason she attempted suicide in the weeks following the accident. She points to the fact that she is a single woman and has scarring on her leg. He also says that she has, and will continue to have, ankle pain, and the possibility of developing posttraumatic osteoarthritis.
>
> On the other hand, if you are satisfied that the only losses the plaintiff has suffered are what the defendant's counsel has told you, then I suggest that you may see fit to award damages in the range that he suggested to you. He suggested that Ms. Ouderkirk's injuries were nothing out of the ordinary for an injury of this kind, that her use of Oxycocet was not necessary for her pain, and she should not have required it. He suggested to you that the six to eight weeks she spent in a cast were typical for this kind of injury, hardware removal is also typical, and her

> risk of posttraumatic osteoarthritis is now only about five percent. In that regard, he suggests that even if she does develop arthritis, there is only a five percent chance that she would require surgery to correct it. He says she is doing well, and does not suffer continuing pain. He says that you should not believe her continued Oxycocet use is because of pain from the ankle injury.
>
> It is up to you to assess Ms. Ouderkirk's pain and suffering, both in the past, currently, and what she may suffer in the future in arriving at your figure for general damages. You should not, though, simply take the range of damages suggested by either counsel for the plaintiff or counsel for the defendant, or even my own range, and divide it in two. If you did that, you would certainly not be acting judicially.

33 No objection was made in respect of the above instruction. It is apparent that the jury rejected the evidence that supported the appellant's position, and preferred the evidence that supported the respondent's position. This they were entitled to do. I would not give effect to this ground of appeal.

34 Pecuniary damages are also in issue on this appeal. At trial, counsel for both parties agreed that the total lost earnings of the appellant were $20,363 and the total out-of-pocket expenses were $660. However, counsel could not agree on whether 100 per cent of the losses were attributable to the injuries the appellant suffered as a result of the accident. The respondent argued that the losses were caused by the appellant's pre-existing conditions. The trial judge advised the jury to decide whether all of the losses, some of the losses or none of the losses resulted from the accident. She invited the jury to provide percentage figures.

35 The jury decided that 50 per cent of the lost income and two-thirds of the out-of-pocket expenses were losses incurred as a result of the accident. The jury appears to have done what they were instructed to do and I see no basis to interfere with the verdict on pecuniary damages.

(iii) Did the trial judge err in admitting three defence photographs of the deck taken a few days before trial?

36 The photographs in issue show the deck with a permanent railing around it and stairs at each end. The photographs were taken in May 2008, six years after the accident and just before trial. There is no issue that, at the time of the accident, there was no railing on the deck. The photographs apparently were tendered to address the issue of whether there were stairs installed at the time of the accident. The trial judge ruled that the photographs were admissible but that counsel for the plaintiff (the appellant) would be allowed "extremely broad leeway in cross-examination on the issue of the stairs". Other photographs taken by the appellant a few weeks after the accident did not show any stairs attached to the deck but they also did not show the ends of the deck, where the stairs were said to be located. The respondent testified that one of the sets of stairs shown in the photographs is the same set that was in place on the night of the party. He explained his testimony on discovery concerning the lack of stairs. He explained that the stairs, which he took from the clothesline, had been installed as temporary stairs that he intended to replace with a new permanent set. His intention on discovery was to say that he had not built new stairs for the deck at the time of the party. The jury was carefully instructed on the issue of the stairs and the conclusions they could draw from the photo-graphs. I am not persuaded that the trial judge erred in her ruling as to the admissibility of the photographs.

DISPOSITION

37 For the above reasons, I would dismiss the appeal. If the parties cannot agree on costs, then we will receive written submissions from the respondent not to exceed 3 pages double spaced within 10 days of the release of these reasons. The appellant may then respond within 7 days of the receipt of the respondent's submissions - not to exceed 3 pages double spaced.

R.P. ARMSTRONG J.A.
K.N. FELDMAN J.A.:-- I agree.
G.J. EPSTEIN J.A.:-- I agree.

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