SUPREME COURT OF NOVA SCOTIA
Citation: *Saulnier v. Diamond*, 2015 NSSC 346

Date: 2015-11-26
Docket: *Halifax*, No. 315607
Registry: Halifax

Between:

Dana Andrew Saulnier

Plaintiff

- and -

Barry Diamond and Dorothy Diamond

Defendants

DECISION

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	November 23, 24, 25 and 26, 2015 in Halifax, Nova Scotia
Oral Decision:	November 26, 2015
Written Decision:	November 30, 2015
Counsel:	Patrick J. Eagan, for the Plaintiff J. W. Stephen Johnston, for the Defendants

INTRODUCTION:

[1] The Plaintiff, Dana Saulnier, fell off a ladder while attempting to assess the work to be done to repair the chimney on the house belonging to the Defendants, Barry and Dorothy Diamond. As a result of the fall Mr. Saulnier suffered significant physical injuries. The ladder used by Mr. Saulnier for his attempted assessment of the required chimney repairs was supplied on site by Mr. Diamond and provided to Mr. Saulnier by Mr. Diamond's son-in-law, Barry Harnish. Mr. Saulnier has sued the Diamonds as the owners of the house in question, alleging a breach of certain provisions of the **Occupier's Liability Act** and/or the common law of negligence. He claims the Diamonds are liable for the injuries and resulting losses which he has suffered.

BACKGROUND:

[2] Around August of 2003, Mr. Diamond had determined that the outside of his wide chimney was in need of repairs above the roof line because some of the mortar was coming off the chimney. Mr. Diamond's daughter, along with her husband, Barry Harnish, were also living in the home with Mr. and Mrs. Diamond. Mr. Harnish said he told Mr. Diamond that he knew a Joe Richardson who may be able to recommend someone to fix the chimney.

[3] Mr. Harnish sought out Mr. Richardson who said that Mr. Saulnier would be a good handyman to ask to do the chimney repairs. Mr. Harnish and Mr. Richardson both went to see Mr. Saulnier at his home to see if he was interested in doing the job. Mr. Saulnier agreed to take a look and give a price estimate to do the repairs.

[4] It was apparent that a ladder would be required to examine the chimney and estimate the required repairs because the work to be done on the chimney was above the roof line of the house. Mr. Saulnier agreed to go take a look and asked if he should bring a ladder. Mr. Harnish replied that it was not necessary to bring his own ladder because there was a good one at the Diamond's house. Mr. Richardson and Mr. Saulnier followed Mr. Harnish to the Diamond residence, in Mr. Saulnier's vehicle. He was driving a station wagon at the time and said that if he had been required to bring his own ladder, he would have tied one to the roof of his vehicle.

[5] Mr. Saulnier testified that he had been out the evening before, playing pool and had about half a dozen beers that evening. He also testified that he had a couple of drinks of whiskey the next morning, before going to the Diamond residence, but he denied being intoxicated and he apparently drove his station wagon there.

[6] There is some divergence of testimony as to what happened upon arriving at the Diamond residence. It is clear that the ladder was stored on nails or hooks behind the shed on the Diamond property. Mr. Saulnier says that Mr. Harnish went to get the ladder behind the shed and placed it on the deck of the house.

[7] Mr. Saulnier testified that he examined the ladder and that, although it showed signs of oxidation and had a small dent, it appeared okay to use.

[8] Mr. Saulnier says he moved the ladder to the ground by the chimney because he did not want to climb onto the roof of the house from the deck. On the other hand, Mr. Harnish said that he told Mr. Saulnier and Mr. Richardson where the ladder was stored behind the shed and that they got the ladder. Mr. Harnish did not testify that the ladder was first placed on the deck. He implied that the ladder had been set up only on the ground in front of the chimney. In any event, the ladder was placed into position in front of the chimney and extended somewhat to reach above the roof overhang surrounding the chimney. Mr. Saulnier decided how much to extend the ladder and where to place the footing ends on the ground. Mr. Richardson was holding the ladder footings for Mr. Saulnier climb. There are three different versions of where the ladder footings were placed on the ground facing the chimney. Mr. Saulnier places the ladder footings closest to the chimney. Diane Harnish, who witnessed the fall from the deck, places the ladder footings

furthest from the chimney, and Mr. Harnish places them somewhere in between the other two. Mr. Richardson is now deceased and we have no other evidence from him. All this to say that we have no clear or precise position for the ladder footings. The presumed position of the ladder footings appears to have been central to the expert report of Archie Frost in order to give an opinion on the probable cause of the ladder failure. Needless to say, without this clear factual foundation, the weight which can be given to Mr. Frost's report and opinion is significantly diminished.

[9] In any event we do know that the ladder was placed in a position to reach the eves troughing on the roof overhang which is in front of the chimney. I also accept Mr. Saulnier's testimony that the ladder extended somewhat above the eves troughing, but we do not know how far above. We do not know the precise position of the ladder footings, but we do know that Mr. Richardson was stabilizing those footings with his feet.

[10] Mr. Saulnier testified that based on his many uses of such ladders, he believed that the angle of the ladder and it extension were at safe positions for the intended use. Mr. Saulnier then began climbing the ladder so he could reach a height to be able to see and count the bricks above the roof overhang. It appears that Mr. Saulnier had not yet reached a height where he could grab on to the eves

trough when Mr. Richardson and Mr. Harnish shouted that the ladder was bending. Before Mr. Saulnier could reach or grab a hold of the eves trough, the ladder failed, collapsed or broke and Mr. Saulnier fell to the hard ground below. Mr. Saulnier suffered serious injuries to his left shoulder which has resulted in a significant loss of range of motion in the arm and the shoulder.

[11] To this day we do not know where the ladder broke or failed. By the time Mr. Frost examined the ladder to provide the Court with his expert report dated November 19, 2003 (Exhibit #12), the ladder had been further damaged, almost beyond recognition (see photos 4 and 5 at Tab 4 of Exhibit #12). No other witness could say where the ladder failed or broke on August 28, 2003, the day Mr. Saulnier fell. For some reason, it appears that no one saw fit to see where the ladder had failed, or to take note of the failure; however, by all accounts, the ladder did fail or buckle, causing Mr. Saulnier to fall to the ground.

[12] What we do know is that the ladder turned out to be unfit or unsafe for the use that was being made of it on August 28, 2003. Counsel for the Defendants has agued that the ladder could only be used to reach a height of nine feet, citing the second last paragraph on page 2 of Mr. Frost's report. That is not entirely correct because that sentence goes on to say, "…plus the normal 3 feet projection above the level of the roof to be reached" [Emphasis added]. That is a total length of at

least 12 feet. In this case, "plus the normal 3 feet projection above the level of the roof to be reached" would not be necessary because there was never any intention to climb onto the narrow roof overhang surrounding the chimney. In fact, according to the diagram at page 3 of Mr. Frost's report, the ladder would appear to have had ample length to more than reach the roof overhang, while still providing the minimum advised overlap of the two sections of the ladder.

[13] In the final analysis, Mr. Frost's report does not provide any clear opinion as to why this ladder failed. In fact, in his cross-examination, he cited several possible alternate causes for the failure, all of which had no factual foundation; except for the exposure of the ladder to the elements over some 20 years and the oxidation of the materials of the ladder.

ISSUES:

1. Are the Defendants liable to the Plaintiff for the injuries he suffered on August 28, 2003:

    a. At common law in negligence and/or negligent misrepresentation; or

    b. By virtue of the **Occupier's Liability Act**;

2. If the answer to either questions 1(a) or 1(b) is yes, then what are the damages which flow from liability?

ANALYSIS:

[14] In his pre-trial brief the Plaintiff argued mostly the issue of liability under the **Occupier's Liability Act**; whereas, at trial and in closing arguments, the Plaintiff concentrated almost entirely on negligence and negligent misrepresentation. I will, therefore, deal with those latter issues first; and, because the facts relating to those principles are almost identical, I will deal with them together.

[15] The basic principles of negligence and negligent misrepresentation are well established and straight forward. There must be a duty of care owed, in this case, by the Diamonds to Mr. Saulnier. I find that there was such a duty. There must be a breach of that duty of care by the Defendants, by falling below the standard of a reasonable person in the position of Mr. and Mrs. Diamond. In this case there is no question that Mr. Harnish acted as the agent of Mr. and Mrs. Diamond with regard to the dealings with Mr. Saulnier, and therefore, his actions are those of the Defendants.

[16] In the case of negligence the breach of the duty of care must have caused, at least in part, the injuries complained of by Mr. Saulnier. In the case of negligent misrepresentation, there must also be reasonable reliance on the misrepresentation which then caused the alleged injuries or damages.

[17] Here we have several facts which point to the negligence of the Defendants in providing their ladder to Mr. Saulnier and representing to him through Mr. Harnish that the ladder was good to be used for the intended purpose. The Diamonds knew the age of the ladder, approximately 20 years. They were wary of the ladder to such an extent that Mr. Diamond had given strict directions that it should not be extended for use because it was old. This had been clearly conveyed to family members, including Mr. Harnish. At first, Mr. Harnish testified that he had conveyed this information to Mr. Saulnier; however, upon cross-examination from his earlier discovery, he conceded that he had given no such warnings. He did not tell Mr. Saulnier that Mr. Diamond had given directions that the ladder should only be used, unextended, to reach the roof from the deck of the house.

[18] While there is different testimony from Mr. Saulnier and Mr. Harnish as to where the ladder was first placed, Mr. Harnish did not advise Mr. Saulnier that the ladder was only considered suitable to reach the house from the deck and should not be extended. According to Mr. Harnish's testimony, the ladder was brought

directly to the ground opposite the chimney. If that was the case, one would have expected Mr. Harnish to advise Mr. Saulnier that the ladder was only considered suitable to reach the roof from the deck and should not be extended.

[19] Mr. Harnish did not advise Mr. Saulnier that the ladder was very old and had been stored outside, exposed to the elements for many years. All he said was that it was a good ladder, inspite of the reservations cited above, of which he was clearly aware.

[20] I find that the Defendants, through Mr. Harnish, owed a duty of care to Mr. Saulnier and breached that duty of care by not advising him of the concerns and directions expressed by Mr. Diamond regarding suitable uses of that ladder. I find that Mr. Saulnier, reasonably relied, in part at least, on those representations. Because of those representations, Mr. Saulnier, did not bring his own ladder to inspect the chimney.

[21] I also find that those representations and omitted representations, caused, at least in part, the fall and resulting injuries to Mr. Saulnier. Mr. Saulnier was provided with a ladder which the Diamonds were already suspect of its suitability for the use which Mr. Harnish plainly saw was being attempted by Mr. Saulnier.

[22] I therefore find that the Defendants negligence and negligent misrepresentation contributed in a significant way to the injuries suffered by Mr. Saulnier.

[23] In my view, for the same reasons outlined above, the Defendants would incur liability under the **Occupier's Liability Act**, particularly sections 4 (1) and (2) of that Act:

> 4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
>
> (2) The duty created by subsection (1) applies in respect of
>
> (a) the condition of the premises;
>
> (b) activities on the premises; and
>
> (c) the conduct of the third parties on the premises.
>
> [Emphasis added]

[24] Having said that, it is not the end of the matter. We still have to consider the actions of Mr. Saulnier on the morning of August 28, 2003. He had been out drinking approximately half a dozen beers the evening before. He admitted having consumed two drinks of whiskey that fateful morning. He said he was not

impaired, but Mrs. Harnish testified that she detected what she considered a smell of alcohol coming from Mr. Saulnier when she approached him after the fall.

[25] Moreover, the evidence suggests that Mr. Saulnier made only a cursory examination of the ladder before setting it up. He also set the ladder up on uneven rocky ground, although he considered that it was stable. It was not reasonable for Mr. Saulnier to attempt what he attempted that morning after having consumed two drinks of whiskey and having had half a dozen beers the evening before.

[26] I therefore find that Mr. Saulnier contributed to the fateful events of that morning for the reasons stated above. I am mindful that in this case, the evidence of both the parties is mostly circumstantial; but I am satisfied, on a balance of probabilities, that both parties contributed to the resulting injuries to Mr. Saulnier.

[27] With regard to the doctrine of *res ipsa loquitur*, the following excerpts from the Supreme Court of Canada case, *Fontaine v. British Columbia (Official Administrator)* [1998] 1 S.C.R. at page 424 are instructional. I quote from page 431:

> A. *When does res ipsa loquitur apply?*
>
> *Res ipsa loquitur*, or "the thing speaks for itself", has been referred to in negligence cases for more than a century. In *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 159 E.R. 665, at p. 596 and p. 667,

> respectively, Erle C. J. defined what has since become known as *res ipsa loquitur* in the following terms:
>
> There must be reasonable evidence of negligence.
>
> But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.
>
> These factual elements have since been recast (see C*lerk & Lindsell on Torts* (13th ed. 1969), at para. 967, quoted with approval in *Jackson v. Millar*, [1976] 1 S.C.R. 225, at p. 235, and *Hellenius v. Lees*, [1972] S.C.R. 165, at p. 172):
>
> The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied if follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate, for the question of the defendant's negligence must be determined on that evidence.
>
> For *res ipsa loquitur* to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the factual circumstances of the case.

[28] I find that it is not necessary to decide what most probably caused the ladder to fail. In fact, that is not possible in this case, particularly because the ladder was never examined by anyone before it had been further damaged, as I said, almost beyond recognition.

[29] I am now required to assess the proportion of the degree of fault which each party is responsible; however, having regard to all the circumstances of this case, as outlined above, it is not possible to establish different degrees of fault. Therefore, in accordance with section 3 (1) of the **Contributory Negligence Act**, I apportion liability equally between the Plaintiff and the Defendants.

DAMAGES:

[30] It remains to determine the damages which resulted and which were caused by the injuries to Mr. Saulnier. It is trite to say that the Plaintiff must prove his damages. As pointed out by counsel for the Defendants, that proof is severely lacking in this case.

[31] I will deal first with general damages. There is no question that Mr. Saulnier suffered serious permanent injuries which have resulted in significant loss of range of motion in his left shoulder and left arm and some loss of strength as shown from the evidence of Dr. Davis. I agree with the Defendants that an award of $55,000 for general damages is appropriate, with interest at 2.5% per year, but for a period

of four years only. The delay in bringing this case forward, namely 12 years, is extreme and not compensable. The total award for general damages is $55,000 plus $5,500 interest for a total of $60,500.

[32] There is no evidence of any significant expenses due to loss of valuable services and I agree with the Defendants that an award of $5,000 is appropriate on that account.

[33] Mr. Saulnier has a history of earning very little income prior to 1987, and practically no income since then. He has been on Social Assistance since his wife left him in 1986. His 2008 Notice of Assessment shows an income of $3,932, which is close to the average he was making prior to 1987.

[34] Mr. Saulnier appears to still be able to do odd jobs as he did prior to 2003 and as he has in fact done since 2003, as shown by the video (Exhibit #2). However, he has not kept any record of his earnings during the period since August of 2003. In the final analysis, Mr. Saulnier has not proven, or even provided any evidence of significant loss of past or future income. However, having said that, his permanent injuries have caused him to have a degree of diminished earning capacity and I award $10,000 in that regard.

CONCLUSION:

[35] I therefore fix Mr. Saulnier's total damages at $60,500 plus $5,000, plus $10,000; for total damages of $75,500. In view of my findings on liability, Mr. Saulnier shall have judgement against the Defendants for half of that amount, being $37,750.

[36] Each party shall bear their own costs.

Boudreau, J.