COURT OF APPEAL FOR ONTARIO

CITATION: Becker v. Toronto (City), 2020 ONCA 607
DATE: 20200928
DOCKET: C67292

Watt, Trotter and Zarnett JJ.A.

BETWEEN

Stephanie Becker, Nicole Becker,
Gerry Becker and Mark Becker

Plaintiffs

(Respondent)

and

City of Toronto, John Doe #1 and John Doe #2

Defendants

(Appellant)

Rebecca L. Bush and Ruby Egit, for the appellant, City of Toronto

Jason F. Katz and Ari Singer, for the respondent, Stephanie Becker

Heard: in writing

On appeal from the judgment of Justice Janet Wilson of the Superior Court of Justice, dated June 28, 2019, with reasons reported at 2019 ONSC 3912.

Zarnett J.A.:

OVERVIEW

[1] The appellant, City of Toronto (the "City"), appeals a trial judgment that found it liable to the respondent, Stephanie Becker ("Ms. Becker"), under the *Occupiers' Liability Act*, R.S.O. 1990 c. O.2 (the "*OLA*").

[2] Ms. Becker was fourteen years old in 2009, when she was injured at the Irving W. Chapley Community Centre, a City-operated community centre located near to her home. A person who had been using the telephone in a staff office at the community centre either tripped into the glass portion of the office door, or punched it (the trial judge found it was probably the latter). Ms. Becker was close to the door when this happened. The glass shattered and struck Ms. Becker. She required four surgeries on her left eye and was rendered legally blind in that eye.

[3] The trial judge found that (i) the City breached the duty of care it owed as an occupier of the community centre, since the glass portion of the door was not made of the type of safety glass required by the 1990 Ontario *Building Code*, O. Reg 413/90, which was in place at the time of the accident[1]; (ii) causation was established, since Ms. Becker's injuries would not have occurred if the required safety glass had been used; and (iii) foreseeability was established, since the damage that occurred was a reasonably foreseeable result of the failure to use the required safety glass. Given her finding of liability, the trial judge awarded damages to Ms. Becker in the agreed sum of $500,000.

[4] At the time of the accident, laminated glass, wired glass, or tempered glass ("tempered safety glass") would have met the minimum *Building Code*

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[1] The Ontario *Building Code* in place at the time of the accident was a regulation under the *Building Code Act*, R.S.O. 1990, c. B.13. The *Act* governs the construction, renovation and change-of-use of buildings in Ontario; the *Building Code* establishes detailed technical and administrative requirements.

requirements of a safety glass. Although at trial the City maintained that the door was made of the required tempered safety glass, the trial judge found as a fact that it was made of ordinary annealed glass, which did not meet *Building Code* requirements. For the purpose of this appeal, the City does not contest the trial judge's findings of fact. Nor does it contest her findings with respect to causation or foreseeability.

[5] Instead, the City argues that the trial judge erred by treating the absence of tempered safety glass as sufficient, in law, to support the conclusion that it breached its duty of care as an occupier under s. 3(1) of the *OLA*. Section 3(1) of the *OLA* provides that:

> An occupier of premises owes a duty to take such care as in all circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

[6] The City argues that since the *OLA* imposes a standard of reasonable care, not a strict liability standard, it could have properly been found to have breached its duty of care under the *OLA* only if there was both an absence of tempered safety glass, and a failure on its part to have taken reasonable care to try to have tempered safety glass installed. In other words, if the City undertook reasonable efforts to have the required type of glass installed, it should not have been found liable, regardless of whether or not that kind of glass was actually installed. The

City submits that the trial judge was required, in law, and because of the evidence led at trial, to consider the matter from that perspective.

[7] For the reasons that follow, I would dismiss the appeal.

[8] At trial, the parties expressly characterized what was at issue and what the trial judge needed to determine with respect to whether the City breached its duty of care. The trial judge characterized, approached, and decided the issue of whether the City had breached its duty of care in accordance with the way the parties put the case to her. There are strong reasons, rooted in policy and trial fairness, to hold parties to the characterization of issues and the theories they assert at trial.

[9] In their opening and closing submissions at trial, the parties described the issue about whether the City breached the occupier's duty of care as turning upon whether the City installed tempered safety glass to meet the minimum requirements under the *Building Code*. As the failure to follow a statutory standard can be evidence of a failure to take reasonable care, this characterization of the issue did not depart from the reasonable care standard under the *OLA*.

[10] The City could have chosen to articulate its theory concerning whether it breached the occupier's duty of care at trial to include the additional question of whether its efforts to have the required kind of glass installed amounted to reasonable care, even though those efforts were unavailing. However, the City

points to nothing in the record to indicate that it did so. The trial judge cannot be criticized for failing to address, or consider evidence from the perspective of, a theory the City did not raise at trial.

ANALYSIS

[11] The determination of this appeal turns on the answers to the following questions:

(a) Did the trial judge's characterization of the issue of whether the duty of care was breached reflect the way the case was put by the parties?

(b) Was the trial judge's characterization of this issue legally sufficient, in the sense that, if resolved in favour of Ms. Becker, it would be a proper legal basis to conclude that the City had breached its duty of care under s. 3(1) of the *OLA*?

(c) Was the trial judge required to consider questions concerning whether the City breached the duty of care beyond those put by the parties and reflected in the theories they advanced at trial?

The Characterization of the Issues at Trial

[12] It was expressly conceded at trial that the City owed a duty of care to Ms. Becker. The trial judge described the issues that she would have to decide as follows:

The Issues

The parties agree that the issues I must decide are:

1. Has the Plaintiff met the onus of proving that the glass in the door of office 113 is annealed glass and not the required tempered safety glass?

2. If the Plaintiff proves that the glass in the door was annealed glass, did the failure to use safety glass cause the Plaintiff's injuries?

3. Even if the Plaintiff meets the burden of proving that the annealed glass caused her injuries, was injury to the Plaintiff a foreseeable risk in all of the circumstances?

[13] The City submits that the trial judge's characterization of the first issue did not reflect all that was involved in determining whether it breached its duty of care. It claims that its case at trial showed that more was involved. I disagree. In my view the trial judge accurately characterized the issue in light of the competing theories advanced by the parties.

[14] Ms. Becker's theory of liability at trial was that the City breached its duty of care as occupier of the community centre because the glass portion of the door was not made of tempered safety glass, which was required under the *Building Code*. Instead, the door was made of ordinary annealed glass. Ms. Becker also alleged a failure of the City to supervise the person who broke the glass, but abandoned that theory before the end of the trial.

[15] In its opening submissions, the City described the issue of whether it had breached its duty of care (beyond the ultimately abandoned allegation of the failure

of supervision) as requiring that the following question be answered: “It will be Your Honour’s job at the end of the day to determine whether the Plaintiff has satisfied you that … the glass that was installed in the office door was not safety glass, as required by the Ontario *Building Code*”. There was no reference, in the opening submissions, to any requirement that the trial judge also determine whether the City had taken reasonable, albeit unsuccessful, steps to try to have the tempered safety glass installed.

[16] None of the glass from the door had been preserved after the accident. Considerable evidence, including expert evidence, was therefore led about the kind of glass that had been installed in the door. The evidence included references to the specifications and drawings developed when the community centre was renovated and the door installed in 1995, the architectural firm and contractors the City had employed, the City’s supervision of the renovation project, and the lack of changes to the door after the renovation project was completed. The evidence also included what was known about how the glass behaved, and any sound it made, when it broke at the time of the accident.

[17] The expert called by Ms. Becker concluded that annealed glass had been installed, while tempered safety glass was what the *Building Code* required. The expert called by the City concluded that the door contained the required tempered safety glass. No expert opinion was proffered at trial on the reasonableness of the City’s steps to try to have tempered safety glass installed.

[18] In Ms. Becker's closing submissions, when addressing whether the City had breached its duty of care, counsel stated:

> [T]he only issue for Your Honour to determine is whether there was, in fact, tempered glass in the door. If it is determined that it was not tempered glass, then the City is in violation of the minimum standards of the Ontario Building Code and, I submit, is therefore in breach of the reasonably-safe standard set by the *Occupiers' Liability Act*.

[19] In the City's closing submissions, the City summarized its position on what needed to be established to find that it was liable as follows:

> Your Honour, in order to succeed, the Plaintiff must prove to you that it's more likely than not that it was annealed glass in the staff office door, at the time of the acciden[t], and that the absence of safety glass caused her injury.

On the issue of whether it breached the duty of care, the City's theory was that "the Plaintiff has not proven to you that it's annealed glass on the balance of probabilities". The City did not submit to the trial judge that there had been a failure to establish a breach of the duty of care, even if Ms. Becker had proven that annealed glass had been used.

[20] Although there is nothing in the parties' description of the issues at trial that includes the theory that the City took reasonable but unsuccessful steps to have tempered safety glass installed, the City relies on the fact that there was evidence at trial of the specifications and drawings used for the renovation of the community centre, and of the City's use and supervision of an architect and contractors. The

City argues that this evidence shows there was an additional question in play at trial with respect to whether it breached its duty of care, beyond the question of what type of glass was actually installed. Specifically, the City says this type of evidence could show that it discharged its duty of care on the basis of its reasonable efforts to have a safe structure even if, despite those efforts, annealed glass ended up being installed by the contractors.

[21] I do not accept that submission. A purpose of characterizing the issues in opening and closing submissions, and in describing what will be involved in deciding the issues, is to give the trial judge a lens through which to appreciate and evaluate the evidence. Leading evidence that is relevant to a theory that has been clearly raised cannot be seen, by itself, to put in issue another theory that has not been raised or articulated, even if the evidence could have also been relevant to the latter, unargued theory.

[22] The City's case at trial was that it did not breach its duty of care unless it was shown that tempered safety glass had not been used. The evidence the City points to was relevant and adduced in relation to that contention. If tempered safety glass was properly indicated in the architectural specifications and drawings, and competent professionals were used and supervised on the project, that might make it more likely that tempered safety glass was actually installed. On the other hand, if tempered safety glass was not properly specified, that might make it less likely it was installed. The trial judge found the specifications and drawings to be

inconsistent, in the course of explaining why she accepted the evidence that annealed glass was used. However, the important point is that the trial judge used the lens provided to her by the description of the issues and the parties' theories in the opening and closing submissions to appreciate and evaluate this evidence and the issue to which it was germane.

[23] That the evidence could have also related to a different theory is beside the point, when the parties' characterization of the issues did not invite the trial judge to appreciate or evaluate the evidence with that theory in mind.

[24] In my view the trial judge correctly characterized the issues the parties had put to her for decision. They did not include the theory that the City took reasonable care in attempting to have tempered safety glass installed, and therefore fulfilled its duty of care, even if tempered safety glass was not actually installed.

The Characterization of the Issue of whether the Duty of Care was Breached was Legally Sufficient

[25] The *OLA* does not impose a strict liability standard. The duty of care of an occupier, set out at s. 3(1), is "to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises … are reasonably safe while on the premises". Accordingly, the City argues that the trial judge's analysis had to focus on whether what the City did or failed to do fell below the standard of reasonable care. The City submits that it was not sufficient, in law, for

the trial judge to focus only on the question of what type of glass was used (which would be a strict liability standard). The City argues that, in this case, the question of whether it took reasonable care also meant whether its efforts to try to have the required glass were reasonable even if unsuccessful. I do not accept the City's submission.

[26] I agree that if parties put forward questions to be answered at trial that, even if answered in the plaintiff's favour, are not legally sufficient to establish that the defendant was liable, a resulting judgment in favour of the plaintiff may be open to question. I also agree that in some situations, even when the parties focus their arguments on one aspect of an issue, the issue they raised may include other aspects that need to be addressed as a matter of law: *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 33. However, the situation in this case is not covered by either of those propositions.

[27] This case did not involve an issue formulated in a way that would not be legally sufficient to ground liability no matter how it was answered. Nor did the issue of whether the duty of care had been breached require, as a matter of law, any additional question to be analyzed beyond the questions the parties had expressly put to the trial judge.

[28] Determining whether the duty of care had been breached by determining whether the City's premises had the type of safety glass required by the *Building*

Code, addressed what the City did or failed to do, and whether that conduct fell below a required standard. A legally inapplicable strict liability approach, imposing liability without consideration of whether the City failed to take reasonable care, was not used.

[29] The City was found to have breached its duty of care not only because it failed to use tempered safety glass but also because that is the type of glass required by the *Building Code*. The *Building Code* is a statutory standard, enacted in the interests of public safety. Although the breach of a statute is not *per se* negligence, a statutory standard, can inform a standard of reasonable conduct. As the Supreme Court of Canada held, in *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at p. 228, there can be civil consequences to the failure to follow a statutory standard as "[t]he statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct."

[30] I interpret the trial judge to have followed that approach when she concluded:

> Installing glass that does not meet minimum public safety standards in an office door in the lobby of a busy public community recreation centre consistently full of tiny tots, and their caregivers, seniors and adolescents meets the test for a breach of the standard of care to ensure persons entering the premises are safe. Hence I conclude that the Plaintiff has proved that the City breached its duty of care.

I do not accept the City's argument that the trial judge's use of the word "ensure" in this passage indicates that she did not properly set out the reasonable care standard. It is clear in the context of the entire passage and her reasons as a whole that she was referring to and properly understood the standard of reasonable care required under s. 3(1) of the *OLA*.

[31] Similarly, characterizing the issue of whether the City had breached its duty of care as one that turned on whether the type of glass required by the *Building Code* had been installed was not legally incomplete, so as to require, as a matter of law, additional questions to be answered. It was not legally necessary for the trial judge to go on to consider whether the City discharged its duty of care on the basis of the specific, although unsuccessful, efforts taken by the City to have the required tempered safety glass installed, where that theory had not been raised.

[32] It was open to the trial judge to treat the failure to use the type of glass required by the *Building Code* as a failure to take reasonable care as the occupier of the community centre. Indeed, that was the very treatment embedded in the parties' theories about whether the duty of care had been breached which turned on whether the type of glass required by the *Building Code* had been used.

[33] Accordingly, the trial judge, in accepting and acting on the formulation of the issues invited by the parties' submissions did not fall into legal error as the City contends.

The Trial Judge Was Not Obliged to Consider the Issue Beyond the Way It Was Advanced at Trial

[34] The City argues that even if it did not, at trial, expressly advance the theory that it had met the duty of care on the basis of its reasonable efforts, regardless of the type of glass that was actually installed, it never abandoned that theory or any defence. Accordingly, it argues that the trial judge should have considered it. Effectively, the City submits that it should be entitled to the benefit of any defence the evidence and law could support, regardless of the theory it expressly articulated to the trial judge, and regardless of the way its submissions framed the questions the trial judge was to decide.

[35] The City's argument runs contrary to the well-established principle that a trial judge errs, not by failing to decide issues that were not raised, but, on the contrary, by deciding a case on a basis not advanced by the parties. Procedural fairness underlies that principle: *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401, at paras. 13, 15.

[36] Strong authority contradicts the City's argument that a position is advanced, and remains on the table, so long as it was pleaded and not formally abandoned, without regard to how the case was put at trial. Although the authorities arise in the context of attempts to raise a new issue on appeal, in my view they apply even

more forcefully to an attempt to argue that a trial judge failed to consider an issue that was not raised before her.

[37] One such authority is *Shaver Hospital for Chest Diseases v. Slesar* (1979), 27 O.R. (3d) 383 (C.A.), leave to appeal refused, [1981] 1 S.C.R. xiii. The defendant physician argued at trial that he had not agreed to turn over his fees to a hospital. On appeal, he pursued a different line of argument, namely, that the agreement with the hospital was void for illegality. The defendant argued on appeal that he had never clearly and unequivocally abandoned this issue, and it was not disputed that it had been properly pleaded. Nevertheless, this court dismissed the appeal, on the basis that it would be unfair to permit the defendant to resurrect an argument virtually abandoned at trial on which relevant evidence was not fully adduced:

> It seems clear, therefore, that the issue of illegality, although clearly pleaded, was not an issue at the trial. The evidence which is said to foreshadow this defence was not introduced for that purpose, but found its way accidentally in the evidence as part of the documentation on the existence of the arrangement. I am therefore of the opinion that it would be manifestly unfair to the respondent to allow the appellant to argue a point which was not raised at the trial at a time when relevant evidence bearing on it could have been introduced.: at pp. 387-38.

[38] In this case, the “reasonable care was exhibited even if tempered safety glass was not installed” theory was not clearly pleaded. Even assuming that the City’s statement of defence was broadly enough drafted to include this theory, the

point is that it was not raised at trial. The evidence the City now points to, such as the involvement of its contractors and architects, was not introduced for the purpose of the “even if” theory. Unfairness to Ms. Becker would have resulted if it had been considered by the trial judge on a theory the City did not articulate.

[39] The City chose to fight the issue of whether it breached the duty of care on the point of the type of glass that was installed. There can be good reasons why a party will pick what appears to be its best point and eschew alternative “even if” or “fallback” positions. Such positions can be seen to weaken or distract from the main point. But that strategic choice has a consequence (if it did not, it would not have been a choice). As this court observed, citing *Shaver*, “you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it.”: *Pedwell v. Pelham (Town)* (2003), 174 O.A.C. 147 (C.A.), leave to appeal refused, [2003] S.C.C.A. No. 355, at para. 50.

[40] To hold otherwise would encourage parties to litigate by instalments, with deleterious consequences for the efficiency of the justice system and for access to justice.

[41] Additionally, I do not accept that the trial judge was required to consider an “even if” theory, which was not argued at trial, just because the City never

expressly abandoned it. The parties may put the matter to the trial judge in a way that implicitly takes a defence off the table. In *Cotic v. Gray*, [1983] 2 S.C.R. 2, the Court considered circumstances in which counsel had agreed, with the approval of the trial judge, that the only question to be submitted to the jury was whether the defendant caused or contributed to the plaintiff's injury. On appeal, the defendant argued that the trial judge had failed to instruct the jury on the issue of foreseeability of injury. The Court dismissed the appeal, finding that the question of foreseeability was implicitly conceded, given the parties' agreement on the question to be submitted for adjudication:

> [The question of foreseeability of suicide in these circumstances, in my opinion, was answered in favour of the respondent by the very form of the question put to the jury. The limited range of the question makes it clear that the question of foreseeability of suicide was agreed upon by the parties before the trial commenced and the only matter left open was that of causation. The parties contested the trial on this basis and it would be improper, in my view, to open a new issue at this time.: at p. 5.

[42] In my view, the way the parties put the issue of whether the City breached its duty of care to the trial judge took any fallback position about whether the City had shown reasonable care, even if the required type of glass had not been installed, off the table. The entire question of reasonable care was subsumed in the question of the type of glass that was installed and whether it complied with the *Building Code*.

[43] The trial judge was not obliged to consider the issue from a perspective other than the way it was put to her by the parties.[2]

CONCLUSION

[44] For these reasons, I would dismiss the City's appeal. If the parties are unable to agree on the costs of the appeal, they may make submissions in writing, limited to two pages each. The submissions on behalf of Ms. Becker should be delivered within ten days of the date of these reasons. The submissions of the City should be delivered within five days of the delivery of Ms. Becker's submissions.

Released: MW September 28, 2020

B Burnett J.A.

I agree. David Brown J.A.

I agree. K.E. Feldman J.A.

[2] Nothing in these reasons should be taken as a comment on the sufficiency of the evidence of reasonable care in trying to have the required glass installed. As I have noted, the evidence was not analyzed by the trial judge from that perspective. Nor is it clear that, if the theory had been advanced by the City, the evidence below would have been limited to what the City now points to.