

COURT OF APPEAL FOR ONTARIO

CITATION: D.M. Drugs (Harris Guardian Drugs) v.  
Barry Edward Bywater (Parkview Hotel), 2013 ONCA 356

DATE: 20130531  
DOCKET: C54151

Rosenberg, Gillese and Tulloch JJ.A.

BETWEEN

D.M. Drugs c.o.b. Harris Guardian Drugs

Plaintiff (Respondent)

and

Barry Edward Bywater c.o.b. Parkview Hotel and the  
Corporation of the City of North Bay

Defendants (Appellant)

AND BETWEEN

Trevor Bywater Inc.

Plaintiff (Respondent)

and

Barry Edward Bywater c.o.b. Parkview Hotel and the  
Corporation of the City of North Bay

Defendants (Appellant)

AND BETWEEN

Diane Piotrowski

(Respondent)

and

Barry Edward Bywater c.o.b. Parkview Hotel and the  
Corporation of the City of North Bay

Defendants (Appellant)

AND BETWEEN

Maurice Bosselle and Joyce Bosselle c.o.b. Joyce's Lingerie Shoppe

Plaintiff (Respondent)

and

Barry Edward Bywater c.o.b. Parkview Hotel and the  
Corporation of the City of North Bay

Defendants (Appellant)

AND BETWEEN

Jack Lavery Jewellers Ltd.

Plaintiff (Respondent)

and

Barry Edward Bywater c.o.b. Parkview Hotel and the  
Corporation of the City of North Bay

Defendants (Appellant)

Cynthia B. Kuehl, for the appellant, Barry Edward Bywater c.o.b. Parkview Hotel  
Geoffrey D.E. Adair, Q.C., for the respondent, D.M. Drugs Ltd.

Heard: October 25, 2012

On appeal from the order of Justice David J. Nadeau of the Superior Court of  
Justice, dated July 27, 2011.

**Tulloch J.A.:**

**A. OVERVIEW**

[1] This appeal concerns an action for damages resulting from a fire that occurred at the Parkview Hotel in North Bay on February 5, 2002. The Parkview was owned and operated by the appellant, Barry Bywater.

[2] The fire destroyed the first two floors of the Parkview and damaged several adjacent buildings. The owners and operators of those buildings commenced an

action for damage to their personal property and alleged negligence on the part of the appellant.

[3] A two and one-half week trial was held in February 2011 on issues relating to liability for the damage caused by the fire; each party tendered expert evidence before the trial judge to support its position on its cause and origin. The trial judge was required to sift through the evidence, make factual findings and draw conclusions in spite of what he described as “extremely divergent and conflicting expert opinions”.

[4] On appeal, the appellant submits that the trial judge provided deficient reasons that do not disclose whether he understood the applicable standard of care or whether he considered relevant evidence. Accordingly, the appellant argues that the trial judge’s reasons are insufficient to permit meaningful appellate review and constitutes a reversible error as described by the Supreme Court of Canada’s decision in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

[5] For the reasons that follow, I am not convinced that the trial judge’s oversight in articulating a precise standard of care constituted a reversible error. Moreover, I am satisfied that the trial judge’s reasons are capable of justifying his decision and provide a sufficient basis for a consideration of the grounds of appeal advanced by the appellant. The reasons amply disclose to the appellant

why the trial judge found him liable for the damage caused by the fire. Accordingly, I would dismiss the appeal.

## **B. BACKGROUND**

### **(1) The Parkview**

[6] The Parkview was 80 years old when it burned down on February 5, 2002. The appellant operated a tavern on the first floor. The second floor contained only dilapidated hotel rooms which, for some time prior to the fire, had not been available for public use. The building was located in downtown North Bay and had been constructed with a wooden “balloon frame” and a brick wall exterior.

[7] The use of balloon frame wooden construction was popular in North America until about 1940 after which it was largely discontinued. In balloon frame construction, a continuous wood stud spans from the foundation of the building to the attic. Horizontal wooden joists connected to the vertical stud at a perpendicular angle support the floors and ceilings of balloon frame structures. Apart from doors or windows, the stud walls do not contain any vertical fire stops. Therefore, a fire can spread rapidly between floors in such buildings.

[8] Part of the basement of the Parkview served as its furnace room. In the furnace room was a natural gas-fired boiler whose exhaust ventilation duct connected to the chimney. The appellant had purchased his boiler second-hand more than ten years before the date of the fire. In 1992, the boiler was the

subject of a fire investigation by an Ontario Fire Marshal (“OFM”) official named Randy Vezina, who, at the time, had noticed holes in the ceiling above the furnace. Vezina issued an Inspection Order to the appellant and returned twice to find that there had been no progress made in the matter.

[9] The appellant did not have the boiler inspected or maintained on a regular basis.

## **(2) The fire**

[10] Around one o’clock in the afternoon on February 5, 2002, the appellant smelled smoke and called 911 to report a possible fire.

[11] When firefighters arrived two minutes later, there was no fire or visible smoke on the first floor of the Parkview. Patrons were in the bar and, apparently, unaware of any danger.

[12] Captain Rivet, one of the first group of firefighters to respond, noticed light smoke as he descended the stairs into the basement. As the firefighters entered the furnace room, they observed a fire in the wooden joists supporting the ceiling just above the exhaust ventilation duct’s entry point into the chimney. Members of this group of firefighters noticed that flames and smoke were being drawn up along the wall around the chimney.

[13] The firefighters returned upstairs to evacuate the premises. Subsequently, they brought a hose down to the basement and extinguished the fire. The

firefighters observed extensive charring in the wooden joists immediately above and around the exhaust ventilation duct's connection to the chimney.

[14] A second team of firefighters arrived at 1:07 p.m. They noted light smoke near the ceiling on the main floor. The leader of the second team, Acting Captain Love, descended to the basement and saw the same charring patterns that had been observed by the first group of firefighters.

[15] Approximately 15 to 20 minutes later, after the initial fire was extinguished in the basement, the firefighters returned upstairs to find that the main floor was filled with smoke. At that time, however, there were no visible flames.

[16] One firefighter went up the stairs to the second floor but, on his way, was forced back due to superheated gases. Subsequently, all firefighters had to evacuate due to fire and thick smoke on the first floor.

[17] Unfortunately, and in spite of the defensive efforts of firefighters, the blaze spread to adjacent buildings in downtown North Bay and caused considerable damage.

### **(3) The OFM investigations**

[18] John Montgomery, a fire investigator with the OFM, was assigned to determine the origin and cause of the Parkview fire. He reported to the scene on February 6, 2002. There was nothing remaining of the first and second floors of the Parkview that assisted Montgomery in his investigation. In the basement, he

noted that there was evidence of pronounced charring in the ceiling area where the flue vent pipe entered the chimney. He observed that this was the only area in the basement that exhibited signs of direct flame and fire damage. Montgomery found that the lowest area of burning was in the ceiling above the exhaust ventilation duct by the chimney.

[19] Montgomery also found no evidence to support electricity as a possible cause of the fire in the basement. He could not, however, rule out electricity as a possible cause for a second floor fire because of its utter destruction. In the result, Montgomery concluded that the cause of the fire must be “undetermined” because he could not confirm or eliminate either the boiler in the basement and electrical wires on the second floor conclusively.

[20] Another OFM official, Qadeer Choudry, prepared an Engineering Report on Fire Investigation dated May 10, 2002. He noted that combustibles, like the wooden ceiling joists in the basement, were required to have a minimum clearance from the ventilation exhaust duct of six inches. However, on examining the installation at the Parkview, he concluded that the exhaust ventilation duct was indeed only four inches. Choudry stated in his report that this arrangement could “result in sufficient heat transfer to cause the ignition of combustibles. In order to determine if the temperatures generated by the exhaust duct were capable of igniting the ceiling joists, additional testing of the boiler would need to be conducted.”

[21] At trial, Choudry also gave evidence that additional testing would have been the best evidence to confirm whether the temperatures generated in the ventilation exhaust duct would have been sufficient to ignite the wooden joists. However, the boiler had degraded and could no longer be started up to permit such testing.

#### **(4) The decision of the trial judge**

[22] The trial judge made a ruling on consent to bifurcate the trial between liability and damages. Therefore, he heard evidence and submissions only on issues relating to liability of the appellant: the origin of the fire, the cause of the fire and whether the appellant was negligent and, if so, whether it was a proximate cause of the damage sustained by the respondents.

[23] At trial, 16 witnesses were called to give *viva voce* evidence. This roster of witnesses included the appellant, firefighters that attended at the scene of the fire, OFM officials charged with investigating the Parkview fire and a number of expert witnesses called by both parties.

[24] The trial judge found that the firefighters' testimony was largely uniform and provided a reliable chronology of events. Most of his factual findings were based on the testimony of the firefighters and the OFM investigators, both groups having had first-hand experience with the fire or its aftermath.

[25] Ultimately, the trial judge characterized the trial as having descended into a classic “battle of the experts” and noted that his task was to determine which, if any, of the wildly divergent experts’ evidence to accept.

[26] The issues relating to liability were hotly contested before the trial judge. The respondent’s expert, Vince Rochon, espoused a “vent pipe theory”: that the fire was caused by deficiencies of the boiler’s exhaust system and its proximity to the wooden joists supporting the ceiling of the basement.

[27] The appellant called two experts, David Scott and Michael Learmonth, to give opinion evidence on the cause and origin of the fire. The appellant also called Jim Roberts who was qualified as an expert in boiler design, installation, operation and maintenance. Roberts was not qualified by the trial judge as an expert on the origin or cause of the fire.

[28] The trial judge found that Scott’s evidence was in error on many of the fundamental factual underpinnings. The reliability of Scott’s evidence was severely undermined in cross-examination. The trial judge further found Learmonth’s evidence to be similarly flawed because his opinion relied upon a factual foundation and assumptions that were not in accordance with the facts that he otherwise found, drawing from the largely uniform testimony of the firefighters, the OFM reports and the physical evidence of the boiler before the court. Moreover, the trial judge remarked it was “obvious that [the] ‘battle of the

experts' was becoming quite personal for [Learmonth]" and that, overall, he did not find Learmonth's evidence to be fair, objective and non-partisan.

[29] As for Roberts, the trial judge was extremely critical of his testimony. He characterized Roberts as having improperly assumed the role of an advocate and offering his intransigent opinion on matters, such as the cause of the fire, that were well outside his qualified realm of expertise. Accordingly, the trial judge found Roberts' testimony to be very unreliable and deserving of no weight.

[30] In the result, the trial judge accepted what he described as the "fair, honest and cogent testimony" of Rochon and found that the vent pipe theory, having also been supported by the testimony of the firefighters and the OFM reports, constituted a much more trustworthy and probable determination of the origin and cause of the fire.

[31] The trial judge found that the appellant did not have the boiler maintained regularly and did not have it periodically inspected. More importantly, having accepted the evidence of Rochon over Roberts, the trial judge found that the boiler was malfunctioning at the time of the fire and that regular inspections and proper maintenance would have detected the problems as well as revealed the fact that the exhaust ventilation duct was too close to the combustible wooden joists. In the result, he concluded that the negligent conduct of the appellant was the proximate cause of the resulting damage from the fire.

**(5) Positions of the parties**

[32] The essence of the appellant's submissions is an attack aimed at the sufficiency of the trial judge's reasons. The appellant argues first that the trial judge failed to consider relevant evidence which, if accepted, would have led to the conclusion that the cause of the fire was undetermined. Second, the appellant argues that the trial judge failed to articulate the precise standard of care required of the appellant and analyze the evidence relating to the issues of negligence and legal causation. The appellant submits that these failures were reversible errors of law requiring interference by this court.

[33] The respondents submit that the trial judge's conclusion on the cause of the fire ought to be upheld in this court. There was evidence to support his factual finding that the fire originated in the basement and was caused by the deficient boiler and inadequate clearance of the exhaust ventilation duct from the wooden ceiling joists. Therefore, the trial judge was entitled to accept the vent pipe theory of causation.

[34] The respondents also submit that there was no legal requirement for the judge to articulate the well-known and obvious standard of care in his negligence analysis. Moreover, there was ample evidence on which the trial judge could have concluded that the appellant failed to meet such a standard.

## C. ANALYSIS

### (1) The sufficiency of a trial judge's reasons

[35] The duty of a trial judge to give reasons was explored in the Supreme Court of Canada's seminal decision in *Sheppard*. While *Sheppard* considered the sufficiency of a trial judge's reasons in criminal matters, the same principles were adapted to the civil context in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41. At para. 98 of *McDougall*, Rothstein J. held that, when assessing a trial judge's duty to give reasons in the civil context, the following four functions should be served:

- (1) To justify and explain the result;
- (2) To tell the losing party why he or she lost;
- (3) To provide for informed consideration of the grounds of appeal; and
- (4) To satisfy the public that justice has been done.

[36] At para. 99, Rothstein J. adopted the reasoning of Binnie J. in another criminal case, *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245. In *Walker*, Binnie J. expanded on the concept of sufficiency of reasons. He explained that the duty to give reasons "should be given a functional and purposeful interpretation". At para. 20, he stated:

Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue.

[37] Put another way, the functions served by a trial judge's reasons are fulfilled if the reasons for judgment explain the basis for the decision reached: see *R. v. H.S.B.*, 2008 SCC 52, [2008] 3 S.C.R. 32, at para. 8. As long as the reasons of the trial judge demonstrate why he arrived at his conclusion, this court will not interfere.

**(2) Resolving the “battle of the experts” and determining the cause and origin of the fire**

[38] In my view, the trial judge provided adequate reasons to resolve the battle of the experts. I reject the argument that he failed to articulate the basis on which he arrived at his decision to accept the vent pipe theory advanced by the respondents.

[39] As I read the trial judge's reasons, it is clear to me that he judiciously undertook the task of sifting through the evidence, both expert and lay, to arrive at a determination of the origin and cause of the fire. He found that, although the OFM report prepared by Choudry could not state conclusively whether the fire had started in the basement, it did indicate an improper clearance distance between the exhaust ventilation duct and the combustible wooden ceiling joists. Choudry indicated that additional testing would be required to confirm whether the temperatures generated by the exhaust duct would be sufficient to ignite the joists. Subsequently, in cross-examination, Choudry was admittedly not prepared to deal in “haves, maybes or possibles”. Noting that the court did not have the

benefit of additional testing of the boiler, the trial judge turned to the expert evidence before him.

[40] At para. 22 of his reasons, he described his general approach to weighing the expert evidence:

In taking stock of each of these expert witnesses, I have assessed their credibility by considering their qualifications for the testimony each preferred as well as their partiality, advocacy and candour. I recognize however that their reliability is a more useful analytical tool for weighing evidence. Therefore I have also assessed what each expert witness reviewed or overlooked in arriving at their opinion. Is their opinion consistent with the facts that I have been able to accept? Is their opinion internally consistent? As always, the expert evidence is only as useful as the assumptions and the information relied upon by the respective expert witness.

[41] After having observed the cross-examination of the appellant's experts, Scott and Learmonth, the trial judge concluded that their opinions rested on a factual foundation that was quite inconsistent with the facts as found by him. For example, Scott eventually acknowledged in cross-examination that flames were first discovered by the firefighters upon their entry into the basement rather than on the main floor as he had previously believed. In cross-examination, Scott also acceded to the view that the perforations in the seams of the piping faced upward toward the wooden ceiling joists. This was consistent with the respondents' vent pipe theory. As for Learmonth, the trial judge found that the chronology and

timelines upon which he relied in postulating his own theory of causation “did not make sense” when contrasted to the objective testimony from the firefighters.

[42] The trial judge did not qualify Roberts as an expert in the cause and origin of the fire and, in my view, properly disregarded his opinion on this issue.

[43] In addition to cataloguing his concerns with the reliability of each of the appellant’s experts, he specifically admonished Roberts and Learmonth for their lack of objectivity and partisanship and attached no weight to their evidence.

[44] In my view, the trial judge was entitled to do so. In *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62, this court reviewed the decision of a trial judge exercising her discretion to exclude the opinion of an expert witness. She did so because the expert “was committed to advancing the theory of the case of his client, thereby assuming the role of an advocate”. In *Piersanti*, O’Connor A.C.J.O. commented on the exceptional nature of excluding expert evidence on this ground. He noted that, in “most cases, the issue of whether an expert lacks independence or objectivity is a matter of weight to be attached to the expert’s evidence rather than as a matter of admissibility.” Nevertheless, O’Connor A.C.J.O. upheld that aspect of the trial judge’s decision and observed, at para. 105, that “[i]n determining whether an expert’s evidence will be helpful, a court will, as a matter of common sense, look to the question of the expert’s independence or objectivity. *A biased expert is unlikely to provide*

*useful assistance* (emphasis added).” Of course, one of the necessary conditions for admitting expert evidence in the first place depends on whether it assists the trier of fact: *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 23 and 24.

[45] In the case at bar, the trial judge explained the lack of objectivity of both Roberts and Learmonth in his reasons. He characterized Roberts as having “demonstrated little respect for differing views, and ... would absolutely not concede in his opinion even when confronted in cross-examination with evidence clearly contradicting his testimony”. The trial judge also noted that Roberts repeatedly offered his opinion on matters beyond his expertise; namely, the cause and origin of the fire. Learmonth, for his part, took the extraordinary step of ordering a transcript of Rochon’s testimony from a recent trial and testified with “apparent disdain and unsubstantiated criticism of [Rochon]”. The trial judge concluded that the “battle of the experts was becoming quite personal for [Learmonth]”. In the result, the trial judge did not find the testimony of either Roberts or Learmonth to be fair, objective and non-partisan. He concluded that he could not rely on either of their opinions.

[46] On the other hand, the trial judge described the opinion of the respondents’ expert, Rochon, as “fair, honest and cogent” and that his evidence was supported by the firefighters’ testimony. He found that Rochon convincingly applied the firefighters’ evidence in support of the vent pipe theory. By contrast, the trial judge described one of the appellant’s experts as “reluctan[t] to answer

even the most direct questions without a rambling partisan reply.” Therefore, he concluded that Rochon presented a much more trustworthy and probable determination of the origin and cause of the fire than that advanced by the appellant and his experts.

[47] An appellate court will not interfere with the evidentiary findings of the trial judge unless they have no basis in the evidence: see *Goodman v. Viljoen*, 2012 ONCA 896, 299 O.A.C. 257, at para. 142. This standard is equally applicable for the admissibility and weight to be attached to expert opinion: see *Piersanti*, at para. 113.

[48] Not only did the trial judge provide adequate reasons, but, in my view, he applied the proper legal principles in weighing the expert evidence. His conclusions were well-supported in the objective and consistent evidence emanating from the testimony of the firefighters. Contrary to the submissions of the appellant, the trial judge was entitled to attach no weight to the expert evidence tendered at trial. Accordingly, I would reject this ground of appeal.

**(3) The standard of care required of the appellant and the proximate cause of the fire**

[49] The appellant also argues that the trial judge failed to articulate the standard of care required of the appellant and analyze the evidence relating to the issues of negligence and proximate causation.

[50] I reject this argument. The trial judge was fully aware of the applicable standard of care. In a general negligence case, the standard of care that must be exercised is that expected of a reasonably prudent person in the same circumstances. This obvious maxim has persisted in substantially the same form since the genesis of the tort of negligence in the House of Lords' decision of *Donoghue v. Stevenson*, [1932] A.C. 562. Furthermore, it is a well-settled proposition that judges are presumed to know the law with which they work day in and day out: *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664.

[51] Again, the proper approach is to read the trial judge's reasons functionally and purposively. On appeal, this court's task is to "simply ensure that, read in the context of the entire record, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the court": see *H.S.B.*, at para. 8.

[52] I am satisfied that the trial judge was alive to the issue of the appellant's breach of the standard of care and the issue of proximate cause; his reasons demonstrate an understanding for the basic negligence analysis. The trial judge listed numerous facts in support of his conclusion that the appellant had breached his standard of care, all of which were consistent with the vent pipe theory advanced by the respondents:

[T]here is proven reasonable evidence of negligence by the [appellant] in the *failure to maintain and inspect the*

*boiler, and in allowing its vent pipe to be too close to the combustible source wood joists contrary to legal and manufacturer's requirements, and for having breaches in its venting system such that it was not closed as required, and for failing to have proper fire resistant material in the immediate area above the vent pipe connector in question.* [Emphasis added.]

[53] A finding that a defendant has breached the standard of care is one of mixed fact and law. Accordingly, it is subject to a standard of palpable and overriding error where there is no clear error in principle with respect to the characterization of the standard or its application: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 37. From the paragraph quoted above, the trial judge identified a number of steps that the appellant could have taken to prevent the fire. At trial, there was no real dispute that the appellant in fact took no such steps.

[54] I reiterate that I would not interfere with the trial judge's decision to accept the vent pipe theory advanced by the respondents and reject the expert evidence adduced by the appellant. Having accepted this theory and its constituent elements, the trial judge was entitled to find that the appellant's failure to inspect or maintain a defective boiler with a perforated vent pipe was causative of the fire that occurred in the Parkview and, accordingly, the damage to the adjacent buildings.

**D. DISPOSITION**

[55] The trial judge's reasons disclosed a thoughtful approach to the evidence that justified and explained the result he reached. In my view, they are sufficient and capable of withstanding appellate scrutiny. The trial judge made clear that he rejected the expert evidence adduced by the appellant; and ultimately, disclosed to the appellant why he lost. Accordingly, I would dismiss the appeal.

[56] If the parties cannot agree on costs they may make submissions in writing within 30 days of the release of these reasons.

Released:

"MAY 31 2013"

"MR"

"M. Tulloch J.A."

"I agree M. Rosenberg J.A."

"I agree E.E. Gillese J.A."