SUPREME COURT OF CANADA

CITATION: Resurfice Corp. *v.* Hanke, [2007] 1 S.C.R. 333, 2007 SCC 7

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BETWEEN:

Resurfice Corp.
Appellant
and
Ralph Robert Hanke
Respondent

AND BETWEEN:

LeClair Equipment Ltd.
Appellant
and
Ralph Robert Hanke
Respondent

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 30) McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

Resurface Corp. *Appellant*

v.

Ralph Robert Hanke *Respondent*

and

LeClair Equipment Ltd. *Appellant*

v.

Ralph Robert Hanke *Respondent*

Indexed as: Resurface Corp. *v.* Hanke

Neutral citation: 2007 SCC 7.

File No.: 31271.

2006: December 12; 2007: February 8.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for alberta

Torts — Negligence — Product liability — Foreseeability — Plaintiff badly burned when hot water poured into gasoline tank of ice-resurfacing machine caused explosion and fire — Plaintiff alleging negligent design of machine — Whether trial judge gave adequate analytical emphasis to evidence concerning placement and marking of gas and water tanks — Whether trial judge erred in failing to consider policy factors in determining foreseeability.

Torts — Negligence — Product liability — Causation — Plaintiff badly burned when hot water poured into gasoline tank of ice-resurfacing machine caused explosion and fire — Plaintiff alleging negligent design of machine — Whether trial judge should have considered comparative blameworthiness of parties — Whether trial judge erred in applying "but for" test rather than "material contribution" test to determine causation.

H, the operator of an ice-resurfacing machine, was badly burned when hot water overfilled the gasoline tank of the machine, releasing vapourized gasoline which was then ignited by an overhead heater, causing an explosion and fire. H sued the manufacturer and distributor of the machine for damages, alleging that the gasoline and water tanks were similar in appearance and placed close together on the machine, making it easy to confuse the two. The trial judge dismissed the action. He found that H did not establish that the accident was caused by the negligence of the manufacturer or distributor. The Court of Appeal set aside the judgment and ordered a new trial, concluding that the trial judge had erred in both his foreseeability and causation analyses.

Held: The appeal should be allowed and the trial judgment restored.

While the Court of Appeal would have preferred a different approach to foreseeability, no error of law or palpable and overriding error of fact or mixed fact and law has been established in the trial judge's approach or conclusion on this issue. There was evidence supporting his finding that H was not confused by the two tanks, notably H's own admission, and the seriousness of H's injury and the relative financial positions of the parties were not matters relevant to foreseeability. [10-12]

With respect to causation, the trial judge did not need to engage in a contributory negligence analysis because he found, not only that H's carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for these injuries. Further, the Court of Appeal erred in holding that the trial judge should have applied the "material contribution" test to determine causation. The basic test remains the "but for" test. This test ensures that a defendant will not be held liable for the plaintiff's injuries where they may very well be due to factors unconnected to the defendant and not the fault of anyone. The "material contribution" test only applies in exceptional cases where factors outside of the plaintiff's control make it impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test, and the plaintiff's injury falls within the ambit of the risk created by the defendant's breach of his duty of care owed to the plaintiff. [17] [21] [23-25] [29]

Cases Cited

Referred to: *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239; *Stewart v. Pettie*, [1995] 1 S.C.R. 131; *R. v. Mohan*, [1994] 2 S.C.R. 9; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23; *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58; *Cook v. Lewis*, [1951] S.C.R. 830.

Authors Cited

Klar, Lewis. "Downsizing Torts". In Nicholas J. Mullany and Allen M. Linden, eds., *Torts Tomorrow: A Tribute to John Fleming*. Sydney, N.S.W.: LBC Information Services, 1998, 305.

APPEAL from a judgment of the Alberta Court of Appeal (McFadyen, Berger and Ritter JJ.A.) (2005), 53 Alta. L.R. (4th) 219, 380 A.R. 216, 363 W.A.C. 216, [2005] A.J. No. 1480 (QL), 2005 ABCA 383, reversing a decision of Wilson J. (2003), 333 A.R. 371, [2003] A.J. No. 946 (QL), 2003 ABQB 616. Appeal allowed.

Daniel W. Hagg, Q.C., and *Jeffrey R. Sermet*, for the appellant Resurface Corp.

David J. Cichy, *Q.C.*, and *E. Jane Sidnell*, for the appellant LeClair Equipment Ltd.

Jonathan P. Rossall, Q.C., and *David D. Risling*, for the respondent.

The judgment of the Court was delivered by

1 THE CHIEF JUSTICE — This case involves a tragic injury that befell a young man, Mr. Hanke, when a water hose was placed into the gasoline tank of an ice-resurfacing machine rather than the water tank. When hot water overfilled the gasoline tank, vapourized gasoline was released into the air. It was ignited by an overhead heater, causing an explosion and fire. Mr. Hanke, who was employed by the City of Edmonton to run the ice-resurfacing machine and look after the ice-rink, was badly burned.

2 Mr. Hanke sued the manufacturer and distributor of the ice-resurfacing machine for damages, alleging design defects. He contended that the gasoline tank and the water tank were similar in appearance and placed close together on the machine, making it easy to confuse the two.

3 After a lengthy trial, the trial judge dismissed Mr. Hanke's action ((2003), 333 A.R. 371, 2003 ABQB 616). He found that Mr. Hanke had not discharged the plaintiff's burden of establishing that the accident was caused by the negligence of the manufacturer or distributor. First, he had not established that it was reasonably foreseeable that an operator of the ice-resurfacing machine would mistake the gas tank and the hot water tank. Second, he had not shown that the defendants caused the accident. The trial judge concluded that the accident had been caused by Mr. Hanke's decision to turn the water on when he knew, or should have known, that the water hose was in the gasoline tank, knowing full well, by his own admission, the difference

between the two tanks. He found as a fact that Mr. Hanke was not confused by the placement and character of the tanks, and consequently that this had not caused the accident.

4 On appeal, the judgment was set aside and a new trial ordered ((2005), 53 Alta. L.R. (4th) 219, 2005 ABCA 383). The Court of Appeal concluded that the trial judge had erred in both his foreseeability and causation analyses. The trial judge's conclusion on foreseeability, the court found, was vitiated by a number of errors, namely: failure to give "adequate analytical emphasis" to certain evidence concerning the placement and marking of the tanks and other workers who had made the same mistake (para. 20); and failure to consider policy factors in determining foreseeability (para. 21). On causation, the Court of Appeal held that the trial judge had erred by failing to consider the "comparative blameworthiness" of the plaintiff and the defendants (paras. 15-16), and in applying a "but for" test instead of a material contribution test (paras. 12-14).

5 The two issues that divided the Alberta courts — foreseeability and causation — dominate the appeal before us. I will deal with each in turn.

A. Foreseeability

6 Liability for negligence requires breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another: *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, at p. 247, *per* Laskin J. (as he then was). By enforcing reasonable standards of conduct, so as to prevent the creation of reasonably foreseeable risks of harm, tort law serves as a disincentive to

risk-creating behaviour: *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 50, *per* Major J. The major elements of a tort action — duty, breach causing injury and cause — reflect "the principle of moral wrongdoing which is the basis of the negligence law": L. Klar, "Downsizing Torts", in N. J. Mullany and A. M. Linden, eds., *Torts Tomorrow: A Tribute to John Fleming* (1998), 305, at p. 307.

7 The trial judge found that it was not reasonably foreseeable that an operator of the ice-resurfacing machine at issue would mistake the gas tank and the hot water tank, and thus place (or allow to remain) a water hose in the gas tank, thereby generating vapourized gasoline that might be ignited by an open flame, leading to an explosion and fire. The trial judge based this conclusion on the evidence, including the different size of the two tanks (one was much taller than the other), and on the fact (as found by him) that the gas tank had a label on it that said "Gasoline Only". He emphasized Mr. Hanke's admission that he knew the difference between the two tanks, and found that he was not confused between them.

8 The Court of Appeal's first criticism on the foreseeability issue was that the trial judge failed to give sufficient "analytical emphasis" to various aspects of the plaintiff's evidence. It is true that, having found that the accident was due to operator error, the trial judge stated, "[t]hus, in this case I do not get to the point of reviewing alleged design error or failure to warn" (para. 65). However, he went on immediately to review all the design errors alleged by the plaintiff and to state why he rejected the allegations (para. 65). He dealt with the allegation of the similar caps, the location of the hot water tank adjacent to the gas tank, the alleged similarity between the two tanks and the issue of warning signs, disposing of each one in turn.

9 The plaintiff submits that the trial judge discounted the evidence of expert witnesses called by the plaintiff on the design of gas delivery systems and the behaviour of workers. It is true that the trial judge placed no reliance on these witnesses. However, a trial judge is not obliged to consider the opinions of expert witnesses if he can arrive at the necessary conclusions on issues of fact and responsibility without doing so: *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 23-24.

10 The plaintiff also submits that the trial judge should have placed more weight on the evidence of two other workers who said they had made similar mistakes in the past, while operating similarly configured machines. The trial judge discounted this evidence on the basis of his finding that in this case there had been no confusion. It is said that this was wrong because the evidence on the absence of confusion was far from conclusive. However, a trial judge is not obliged to accept all of the evidence. What is essential is that there be evidence to support the findings of fact he or she makes. The Court of Appeal can interfere with findings of fact only if the trial judge has made a palpable and overriding error with respect to them: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 10. There was evidence that supported the trial judge's finding that Mr. Hanke was not confused, notably his own admission. The trial judge's finding of no confusion therefore cannot be displaced.

11 The Court of Appeal's second criticism of the trial judge's rejection of reasonable foreseeability was that the trial judge failed to consider policy matters, namely the seriousness of the injury and the relative financial positions of the parties. The Court of Appeal erred in suggesting that these matters are relevant to foreseeability. Foreseeability depends on what a reasonable person would anticipate, not on the seriousness of the plaintiff's injuries (as in this case) or the depth of the

defendant's pockets: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 55.

12 I conclude that, while the Court of Appeal would have preferred a different approach to foreseeability, no error of law or palpable and overriding error of fact or mixed fact and law has been established in the trial judge's approach or conclusion. The Court of Appeal erred in interfering on this ground.

B. Causation

13 The trial judge stated that "[t]he onus is on the Plaintiff to establish that the damage was caused by the negligence of one or both of the Defendants to some degree" (para. 10). He also said: "I must find causation against these defendants before considering contribution" (para. 46). He went on to conclude: "The Plaintiff has failed to establish that the injuries were caused by negligent design. . . . That being the case, it is not necessary for this Court to consider the apportionment of fault under the rules of contribution . . ." (para. 58).

14 The trial judge based these conclusions on the evidence. He emphasized Mr. Hanke's admission that "when he looked at the unit from behind he knew precisely which was the water tank and which was the gasoline tank" (para. 41), as well as his admission that "he was fully familiar with the fact that hot water should not be introduced into the gasoline tank" (para. 42). He noted that the caps on the two tanks as designed and delivered had been different, and had been replaced by similar caps by the City. He also noted the absence of evidence from Mr. Binette, who had prepped the machine before Mr. Hanke's arrival. Although he stated that he did not

get to the point of "reviewing alleged design error or failure to warn", as noted above (para. 8), he also went on to consider the alleged design errors, disposing of each in turn (para. 65). He concluded that "there is no evidence that would show to the balance of probabilities that this event was caused by the defendants" (para. 54).

15 The Court of Appeal stated that the trial judge had erred in failing to conduct a proper contributory negligence analysis and thus in not considering the comparative blameworthiness of the plaintiff and the defendants (paras. 15-16). The Court of Appeal also found that the trial judge erred in applying a "but for" test for causation instead of a material contribution test (paras. 12-14).

1. *Comparative Blameworthiness*

16 The appellants argue that the Court of Appeal erred in suggesting that "comparative blameworthiness" is a necessary component of the causation analysis. The suggestion attributed to the Court of Appeal is that a court must approach causation not simply by asking whether the defendant's negligent act caused the loss, but by looking globally at all possible causes.

17 It is true that the trial judgment contains some passages that suggest that the carelessness of Mr. Hanke automatically absolves the respondent manufacturer and distributor of liability. That is not the case. An example, put to us in oral argument, illustrates the point. If it is industry standard to design an iron with an automatic shut-off switch, and an iron is manufactured without such a switch, the manufacturer of the iron is not absolved of liability merely because the plaintiff was careless in leaving the iron on, resulting in a fire and injuries to the plaintiff. However, I am satisfied that the

trial judge found not only that Mr. Hanke's carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for Mr. Hanke's injuries. For example, the trial judge noted that "the accident was caused by operator error and had nothing to do with the design or manufacture of the machine" (para. 56). In light of this finding there was no need for the trial judge to engage in a contributory negligence analysis.

2. *The Test for Causation*

18 The Court of Appeal found, correctly, that the trial judge had applied a "but for" test in determining causation, stating, "[t]he thrust of the reasoning is that 'but for' the Appellant putting or leaving the hose in the gasoline tank, the explosion would not have occurred" (para. 12). Referring to the observation in *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 15, that the "but for" test "is unworkable in some circumstances", the Court of Appeal concluded that this was such a case and that the trial judge should have used a "material contribution" test instead of the "but for" test (para. 14).

19 The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this Court's judgments in *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Athey v. Leonati*, at para. 14; *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R.

647, 2001 SCC 23, at paras. 87-88, and *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58, at para. 78.

20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for

the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

26 These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

27 One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.

28 A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York Finch General Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.

29 In this case, the Court of Appeal erred in failing to recognize that the basic test for causation remains the "but for" test. It further erred in applying the material contribution test in circumstances where its use was neither necessary nor justified.

C. Conclusion

30 I would allow the appeal, set aside the order of the Court of Appeal and restore the trial judgment, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant Resurfice Corp.: Bryan & Company, Edmonton.

Solicitors for the appellant LeClair Equipment Ltd.: Miller Thomson, Calgary.

Solicitors for the respondent: McLennan Ross, Edmonton.