In the Court of Appeal of Alberta

Citation: Desanti v. Gray, 2011 ABCA 226

Date: 20110722
Docket: 1001-0292-AC
Registry: Calgary

Between:

Jordan M. Wenzel

Not a Party to the Appeal
(Plaintiff)

- and -

Michael A. Desanti and Agat Laboratories Ltd.

Appellants
(Defendants)

- and -

Robert Gray and Sharon Gray

Respondents
(Third Parties)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice J.D. Bruce McDonald

Reasons for Judgment Reserved of The Honourable Mr. Justice Watson
Concurred in by The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice McDonald

Appeal from the Order by
The Honourable Madam Justice S.M. Bensler
Dated the 13th day of October, 2010
Filed on the 4th day of November, 2010
(Docket: 0801-08621)

Reasons for Judgment Reserved of
The Honourable Mr. Justice Watson

I Introduction

[1] The lawsuit below rests on a claim by the plaintiff, Jordan Wenzel, for injuries suffered by him just after midnight on September 3, 2006, when Wenzel was struck by a vehicle operated by the appellant, Michael Desanti, a defendant below. The appellant Agat Laboratories was the owner of the vehicle and also a defendant below. Although Wenzel's claim sounded in part in negligence, the real essence of the case was for assault and battery of Wenzel by Desanti by use of the vehicle.

[2] The actions of Desanti towards Wenzel were described in the evidence below as part of a confrontation involving various young people. This confrontation occurred on a public street about a block from the residence of the respondents, Robert and Sharon Gray. Young people including the plaintiff who had gathered for a party at the Gray residence had left that party and were going home. The defendant Desanti was not one of the invited guests at the party, although a female friend of his was there.

[3] The appellants issued third party proceedings seeking contribution from the Grays for the injuries to Wenzel out of this incident under the *Tort-Feasors Act*, R.S.A. 2000, c. T-5, on the basis the Grays would also be "liable" to compensate Wenzel. The third party proceedings claimed that the Grays caused or contributed to Wenzel's injuries and were liable to him on the basis that (a) they "assumed control over the Plaintiff, a minor" and owed "fiduciary duties" to him, (b) they "created, contributed to, assisted in or otherwise acquiesced to the Confrontation which resulted in the Collision" and (c) they were liable under the *Occupiers Liability Act*, R.S.A. 2000, c. O-4.

[4] The Grays, in due course, applied for summary judgment dismissing the third party claim against them by the appellants. Wenzel had not sued the Grays himself. The application of the Grays was done on an evidential record pursuant to what was then Rule 158(2) of the *Alberta Rules of Court*, AR 390/68. During such hearings all parties were expected to put their "best foot forward" as to what their cases involved. The chambers judge gave succinct reasons for granting summary judgment dismissing the third party claims against the Grays. Her reasons were punctuated with the following observation, "To put the Grays through a full-blown trial would be a travesty of justice." We agree. The appeal is dismissed.

II Context

[5] A brief overview of the circumstances is sufficient for these reasons. On September 3, 2006, the respondents' son, then 17 years old, had a party in the respondents' home. The party primarily took place in the basement. The respondents stayed home to monitor the party and spent the majority of the evening on the main floor in the family room.

[6] As noted above, Desanti was not a guest at the party, nor did he "attend", except in the limited sense described below. Desanti's girlfriend, Marianne Albrecht, was one of the guests.

[7] Many of the guests, including the plaintiff Wenzel (not a party to this appeal) were minors. Alcohol was consumed. The extent of the respondents' knowledge of the consumption of alcohol by Wenzel was in dispute below. The appellants suggested that the respondents were consuming alcohol with the guests, thereby encouraging the consumption of alcohol by underage minors. The respondents expressly deny this. By the end of the party at 11:30 pm, the respondents knew that some alcohol had been consumed by some of the guests. The plaintiff Wenzel was intoxicated.

[8] The respondents invited the guests to come upstairs to the kitchen to have a snack and non-alcoholic drink before leaving the party. The respondents also made inquiries to determine how their son's guests would be getting home and whether they lived nearby so they could walk.

[9] At some point thereafter, Albrecht spoke with Desanti on a cell phone. An argument ensued. At some point, the plaintiff Wenzel came into possession of the cell phone. He threatened Desanti and offered to fight him. There is nothing in the materials to suggest that the respondents actually heard this conversation or were even aware of it.

[10] The guests left the party. Unbeknownst to the respondents, Desanti drove towards the residence and parked his car at the end of the cul-de-sac, about a block from the house. Wenzel and some of the male guests noticed Desanti's vehicle and ran towards it. Desanti got out of his vehicle and a physical altercation with Wenzel and several of the guests ensued. Desanti, after being struck, got back into his vehicle and either accidently or intentionally twice hit Wenzel with the vehicle.

III Reasons for Decision

[11] In her reasons, the chambers judge placed emphasis on ***Childs v. Desormeaux***, 2006 SCC 18, [2006] 1 SCR 643 at para. 44, where the Supreme Court of Canada held that serving alcohol at a private party was insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest. Whether or not a jural relationship of proximity existed between the Grays and the plaintiff while the latter was actually at the party, the chambers judge found no such relationship existed between the Grays and the appellants, and no dispute was made by the appellants as to that. Nor did the appellants suggest the chambers judge erred as to the *Tort-Feasors Act*.

[12] The issue was whether there was a triable issue as to whether the Grays were liable to Wenzel. The chambers judge found that, on the available evidence, the link between the conduct of the Grays (which was said to not adequately prevent (a) alcohol being consumed by Wenzel or (b) Wenzel from going out to confront Desanti) on the one hand, and the damages caused by Desanti to Wenzel, on the other, was far too attenuated to be foreseeable or to establish legal proximity.

[13] In other words, she found that it was not a triable question whether anything done or not done by the Grays rendered them liable to Wenzel. In any event, she found that the Grays did what they could by staying home to monitor the party, offering food and non-alcoholic drinks before guests left, and making sure everyone could get home safely, so if there was a duty of care to Wenzel it was not breached. We need not address standard of care or breach in this instance.

IV Issues on Appeal

[14] On appeal, the appellants argue that the chambers judge erred in finding Wenzel's injuries were not foreseeable and that there was no genuine issue in whether the Grays breached their duty of care to Wenzel in the circumstances. They argue that the chambers judge erred in considering the manner in which Wenzel was injured rather than simply the fact that he was injured. They argue that injury was reasonably foreseeable when "loud arrangements" were being made for a fight in the immediate vicinity of the respondents' home. While the only direct evidence before her as to the Grays being aware that Wenzel contemplated a confrontation with Desanti was a denial of knowledge by the Grays, we can pass this point to address the legal accuracy of the ruling below. As the appellants point to no established route of liability, the two aspects of proximity discussed in ***Childs*** rise for consideration.

[15] In an effort to characterize the present case as one which did not involve a novel tort or a truly novel extension of existing tort liability for a social host, the appellants referred to paras. 35 to 37 of ***Childs***, which described three "situations" where the law of tort had recognized duties of care. In particular, the appellants sought to rest their claim in para. 36 of ***Childs*** as to "paternalistic relationships of supervision and control". Accordingly, the appellants suggest that it is not necessary for them to show proximity sufficient to support a duty of care, or proximity sufficient to answer concerns of public policy such as indeterminate liability. The appellants assert that the issue of whether the outcome was foreseeable should have been decided in the ordinary way, and was a triable question of fact.

[16] They contend that the level of foreseeability sufficient to justify their claim is met by foreseeability of *any* harm to an intoxicated underage guest after that person leaves the residence of the social host. For this proposition, the appellants cite: ***Keenan v. Brown***, 2009 NBCA 81, 351 N.B.R. (2d) 122, leave denied, [2009] S.C.C.A. No. 9 (QL) at para. 7 (an occupiers' liability case where an intoxicated guest dove from a pier on a lake at the defendant's home into unmarked and dangerously shallow water); ***Jordan House Ltd. v. Menow***, [1974] S.C.R. 239 (a commercial host case, comparable to ***Stewart v. Pettie,*** [1995] 1 S.C.R. 131, 162 A.R. 241 and distinguishable by para. 37 in ***Childs***); ***Brophy v. United Taxi***, 2010 ONSC 2295 (taxi company liability grounded on misconduct by one of their drivers, and thus raising supervision and control issues more relevant to vicarious liability as in ***B. (E.) v. Order of the Oblates***, 2005 SCC 60, [2005] 3 S.C.R. 45, 2005 SCC 60 at paras. 3, 4 and 48); and two cases on buildings with structural defects.

[17] The appellants also argued in their factum that the chambers judge erred by failing to consider the statutory duty of care owed under the *Occupier's Liability Act,* R.S. A. 2000, c. O-4. They said that the statutory duty imposed was not negated simply because the accident occurred down the street from the respondents' property. However, this argument on the *Occupier's Liability Act* was abandoned during oral argument before this Court.

[18] As part of their appeal, the appellants also seek leave to adduce new evidence pursuant to Rules 516.2 and 518 of the *Alberta Rules of Court.* The new evidence is an admission made by Wenzel at questioning on undertaking responses which were conducted after the summary judgment application. The extent of that admission was that there was "likely some connection" between his being intoxicated and "getting involved in the fight". They argue that they satisfy the well known test for admission cited in ***Palmer v. The Queen***, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193, and others, in that the evidence could not have been previously adduced with due diligence, is relevant and bears upon a decisive or potentially decisive issue, is cogent in the sense of being reasonably capable of belief and reliance and is such that, when taken with the other evidence, could have been expected to have affected the result.

[19] The appellants contend that the test for summary judgment is high and, citing ***Canada (Attorney General) v. Lameman***, 2008 SCC 14, [2008] 1 SCR 372 at para. 10, that "it is essential to justice that claims disclosing real issues that may be successful proceed to trial". They argue that whether Wenzel's injuries following the party were reasonably foreseeable was a genuine issue for trial. More so, they argue, if the fresh evidence is taken into account, given what they say is Wenzel's concession in a suggestive question on examination for discovery that there may have been a connection between his being drunk and his taking part in a confrontation with Desanti.

V Standard of Review

[20] ***Lameman*** instructs that parties are still expected to put their "best foot forward". Moreover, the chambers judge is entitled to make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: ***Hughes (Estate) v. Brady***, 2009 ABCA 187, 454 A.R. 190, leave denied [2009] S.C.C.A. No. 322 (QL) at para 12. On this motion, the chambers judge was exercising discretionary judgment and this court does not simply substitute its opinion for hers on such assessments: ***Murphy Oil Co. v. Predator Corp.***, 2006 ABCA 69, 384 A.R. 251 at para. 23. Deference is owed on fact findings underlying a discretionary decision to grant summary judgment. Accordingly, a chambers decision should not be upset unless it is unreasonable: ***Wolfert v. Shuchuk***, 2003 ABCA 109, 15 Alta. L.R. (4th) 5 at para. 9.

[21] On the other hand, correctness applies to the legal test for summary judgment: see ***Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.***, 2010 ABCA 126, 447 A.R. 112, leave denied [2010] S.C.C.A. No. 234 (QL) at para. 10; ***Desoto Resources Limited v. Encana Corporation***, 2011 ABCA 100, [2011] A.J. No. 355 (QL) at para. 19. Accordingly, it would seem wise for any court to keep a weather eye out for the distinction between a point of fact which is

subject to evidence and adjudication and the assertion of a legal argument. A real conflict on a material point of fact tells against summary judgment: see *e.g.* ***Poliquin v. Devon Canada Corporation***, 2009 ABCA 216, 454 A.R. 61 at paras. 13 and 14.

VI Discussion

[22] We are not persuaded that there is any extricable error of law nor any palpable and overriding error of fact in finding that there was no genuine issue to be tried. The chambers judge reasonably concluded that the Grays were not aware of any confrontation - impending or otherwise - between the plaintiff Wenzel and the appellant Desanti. (Moreover, the chambers judge found that the Grays did every thing expected in social host situations absent that information.) Nonetheless, even if it were assumed that there is a triable case that the Grays overheard Wenzel speaking aggressively about a confrontation with Desanti, the matters of foreseeability and proximity still had to be determined by the chambers judge, and she did so correctly. This situation did not fall within the language of ***Childs*** in paras. 35 to 37. Rather, it fell within the language of ***Childs*** at paras. 38 to 41, and is not an "appropriate extension" of social host liability.

[23] In these circumstances, the appellants cannot satisfy the first prong of the ***Anns*** proximity test (***Anns v. Merton London Borough Council***, [1978] A.C. 728 (H.L.)) for determining the existence of a duty of care, namely the foreseeability of the physical harm suffered by the plaintiff at the hands of a third party due to his consuming alcohol at the party. It is simply not reasonably foreseeable to a householder that a guest who has left a party at that house would be the victim of an assault at some place outside of the control of the householder simply because the guest was consuming alcohol at the party: see by comparison ***Kauk v. Dickson***, 2008 ONCA 97, 53 C.C.L.T. (3d) 223 (a commercial host case); ***Dickerson v. 1610396 Ontario Inc.***, 2010 ONCA 894, 329 D.L.R. (4th) 542 (a commercial host case). To conclude otherwise would unreasonably extend social host liability beyond that presently envisioned by the law. This is so even if the social host hears something that suggests that the plaintiff guest might act in an unwise manner after he has left.

[24] As pointed out to counsel during argument, the extension of social host liability thus proposed by the appellants would not be limited to situations where the guest is intoxicated. The potential plaintiff guest might be sober but angry or sad or insouciant to a degree that makes it foreseeable that the guest might fall into some harm at some stage in the future. The factor of intoxication here is not a moral hook on which to hang liability. The only relevance of Wenzel's level of insobriety, if anything, is said to be in influencing his decision to confront Desanti. Wenzel's insobriety did not cause his injury. He was injured in a dispute with Desanti. On the other hand, the introduction of insobriety as a factor demonstrates the indeterminate nature of the liability thus proposed, since presumably the level of insobriety, or how long it might last, or its effect on the mental state of the guest, would all be factors to consider in assessing any such foreseeability. And all of this ignores the lack of any "control" by the social host from which a duty to take protective measures (for whatever time and space is said to be predictably involved) would spring.

[25] Thus, even if proximity at the first phase of ***Childs*** were to be assumed, the indeterminate liability concern would certainly rise to the occasion at the second level of the ***Anns*** analysis. Implicit in an extension of social host liability for voluntary guests becoming crime victims after they have left any area in which the hosts have any control of the situation would be an undefined form of extended guardianship. This form of liability cannot be reconciled in a legally manageable way with the proper limits of personal liability in negligence as discussed in ***Childs***. Indeed, it is even conceptually in tension with the restrictions on vicarious liability: see e.g. ***E. (B.) v. Oblates***. In practical terms, it is not easy to define such an extension of social host liability.

[26] Nor are we persuaded that the fresh evidence would have affected the outcome. Whether Desanti intentionally or accidentally injured Wenzel with his vehicle, the link to the Grays is still too remote and beyond the scope of liability. Even if it could be proven that Wenzel had actually provoked an assault on himself by Desanti after he was a block away from the Grays' house, how would that fact enhance the responsibility of the Grays? The reasoning said to form this link is oblivious to the common sense question applicable to both Wenzel and Desanti: are people not individually responsible for their own voluntary conduct? People of Wenzel's age can acquire driver's licenses, advance far in school, and hold down jobs. Social hosts can only do so much in a free society.

[27] The proposed new evidence falls well short of the materiality and juridical significance criteria for the admission of new evidence on appeal. Further, in light of its vagueness and subjectivity, it falls short of the cogency requirement as well. It is even doubtful as a basis for causation. While the chambers judge did not tarry on the topic of causation, we would observe for clarity that we have considerable difficulty seeing what the action or inaction of the Grays had to do with *what Desanti decided to do* to Wenzel having regard to the 'but for' standard: see e.g. ***Fullowka v. Royal Oak Ventures***, 2010 SCC 5, [2010] 1 S.C.R. 132 at para, 95. As noted, we need not get into a discussion of standard of care and its breach under the circumstances here and need say no more with respect to causation. But we note this point of causation because it illuminates the fact that the ability of Desanti to claim contribution from the Grays is fundamentally grounded on Desanti's unilateral actions. The appellants would shift or share liability to the Grays for Desanti's unilateral conduct over which the Grays could, under no view of this case, have been able to forecast or control. At the very least, this is not a compelling policy point in favour of the appeal.

[28] The appellant's discontinuance of argument under the *Occupiers Liability Act* was appropriate. Section 5 of the *Act* requires an occupier of premises to "take such care as in all the circumstances of the case is reasonable to see that persons ... are reasonably safe while on the premises". This is not a case like ***Adeels Palace Pty Ltd v. Moubarak***, [2009] HCA 48, where the Australian High Court, within a distinct statutory framework, considered commercial host liability to keep liquored up patrons from getting into fights on the premises. The proposed extension of the *Occupiers Liability Act* to the present facts of a social host was without merit.

VII Conclusion

[29] In the result, the application to introduce fresh evidence on appeal is dismissed as the proposed fresh evidence is not admissible. The appellants' appeal from the summary judgment is dismissed.

Appeal heard on June 16, 2011

Reasons filed at Calgary, Alberta
this 22nd day of July, 2011

Watson J.A.

I concur:

Conrad J.A.

I concur:

Authorized to sign for: McDonald J.A.

Appearances:

P.J. Heinsen / J. Farrow
for the Appellants

D. Pick
for the Respondents