COURT OF APPEAL FOR ONTARIO

CITATION: Moore v. 7595611 Canada Corp., 2021 ONCA 459
DATE: 20210625
DOCKET: C67757

Fairburn A.C.J.O., Harvison Young and Jamal JJ.A.

BETWEEN

Janet Moore and Robert Lamers

Plaintiffs (Respondents)

and

7595611 Canada Corp. and Konstantin Lysenko

Defendants (Appellants)

Konstantin Lysenko, acting in person for the appellants

Christopher I.R. Morrison, Michael Smitiuch and Luke Hamer, for the respondents

Heard: June 11, 2021 by videoconference

On appeal from the judgment of Justice Erika Chozik of the Superior Court of Justice, sitting with a jury, dated November 6, 2019.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] The respondents' daughter, Alisha Lamers, died from severe injuries suffered in a horrific fire. The fire broke out in the early morning hours of November 20, 2013, while she was asleep in the bedroom of her basement apartment located

in a rooming house. That apartment was owned by the appellants, Konstantin Lysenko and his numbered corporation. Mr. Lysenko was Alisha's landlord.

[2] Alisha was trapped in an inferno with no way to escape. The windows were barred, and the only exit to the apartment was engulfed in flames and smoke. The interior access stairway connecting the basement apartment to the main rooming house was blocked off, thereby leaving only one potential exit and entry point to the basement apartment. Alisha's rescue had to await the firefighters who arrived on scene.

[3] Alisha clung to life for a few days with her parents at her bedside at Sunnybrook Hospital. Alisha's parents witnessed the terrible reality of seeing their only child with third-degree burns over half of her body and parts of her body disintegrating before their eyes. They also watched as Alisha went into cardiac arrest on multiple occasions. Ultimately, the parents had to make the excruciating decision to remove their child from life support given that a brain scan showed that Alisha was without brain activity.

[4] The respondents commenced an action against the appellants for their negligent conduct that led to the death of their daughter. Following a trial, the jury found the appellants fell below the standard of care of a reasonable landlord and found them responsible for Alisha's death. The jury made the following damages awards:

1. Loss of care, guidance, and companionship: $250,000 to each respondent;
2. Mental distress: $250,000 to each respondent;
3. Future costs of care for the respondent father: $174,800; and
4. Future costs of care for the respondent mother: $151,200.

[5] Mr. Lysenko advances multiple grounds of appeal on behalf of the appellants. For the reasons that follow, I would dismiss the appeal in its entirety.

B. THE JURY SELECTION

[6] First, Mr. Lysenko claims that the jury was improperly selected because of an irregularity that occurred before the trial. Specifically, there were 41 prospective jurors who had been inadvertently released from the jury pool. Technically, those 41 prospective jurors should have been in the jury pool used to select the jury in this case. Despite those 41 people having been released from jury duty, the pool of prospective jurors was not exhausted before the jury was selected.

[7] The trial judge learned of the irregularity after the jury was selected. She raised the issue with the parties and invited their input. The respondents' counsel took no objection. However, Mr. Lysenko raised an objection, noting the appellants' preference to proceed with a new jury selection. He then specified that the appellants would be prepared to move ahead with a judge alone trial if needed. The respondents' counsel reiterated that the respondents preferred a jury and that

the trial should proceed with the jury that has already been selected. In response, Mr. Lysenko raised an objection that was unrelated to the procedural glitch that had resulted from the release of the prospective jurors. His objection was that there were "ladies dominating in the jury" and that he had a preference for "some representation of … both genders."

[8] Section 44(1) of the *Juries Act*, R.S.O. 1990, c. J.3, makes it clear that any omission to observe a provision of the *Juries Act* respecting the selection of jurors is "not a ground for impeaching or quashing a verdict or judgment in any action." At most, the release of the 41 prospective jurors was a minor irregularity that resulted in no prejudice to the appellants. Accordingly, I would not give effect to this ground of appeal.

C. SECTION 76 OF THE *FIRE PROTECTION AND PREVENTION ACT*

[9] Second, Mr. Lysenko argues that s. 76 of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4, precluded the respondents' action in this case because it was not proven that the fire started from anything other than an accidental source. Section 76 of the *Fire Protection and Prevention Act* reads as follows:

> No action shall be brought against any person in whose house or building or on whose land any fire accidentally begins, nor shall any recompense be made by that person for any damage suffered thereby; but no agreement between a landlord and tenant is defeated or made void by this Act.

[10] While it is correct that the cause of the fire remained undetermined at trial, there is no need to delve into the inner workings of the *Fire Protection and Prevention Act* to resolve this ground of appeal because of what the jury found in relation to the appellants' negligent acts. At a minimum, the genesis of a fire does not immunize a landlord from a failure to take reasonable precautions to protect the occupants of a building from a fire, even if that fire breaks out accidentally.

[11] In this case, the jury found that the appellants were responsible for Alisha's death for the following reasons: the failure to ensure that a safety plan for the building was prepared, approved, and implemented; the failure to maintain smoke alarms in operating condition; and the failure to provide at least two exits from each "floor area" of the rooming house. Therefore, the jury's finding of negligence had nothing to do with the source of the fire. Rather, the jury found that because of the appellants' negligent acts, Alisha was left helpless in the face of a fire, which led to her injuries and eventual death. Therefore, I would not give effect to this ground of appeal.

D. THE REASONABLENESS OF THE VERDICT

[12] Third, Mr. Lysenko argues that the jury's verdict was unreasonable and that the circumstances surrounding the fire and Alisha's death were suspicious. There is no basis upon which to advance this argument on appeal.

[13] As just previously set out, the jury's verdict listed three bases upon which they found the appellants responsible for Alisha's death: a lack of a properly implemented safety plan; inoperative smoke alarms; and insufficient exits. Importantly, there was a clear factual foundation for those findings. Indeed, prior to this matter going to trial, the appellants pled guilty to and were convicted of numerous offences under Ontario's *Fire Code*, O. Reg. 213/07, made pursuant to the *Fire Protection and Prevention Act*. Those offences included: failing to provide at least two exits from each floor of the rooming house where Alisha lived; failing to maintain smoke alarms in operating condition; and failing to ensure a fire safety plan was prepared, approved, and implemented in the building. For those offences, the numbered corporation was fined $40,000, and Mr. Lysenko received a suspended sentence and probation for 18 months and a fine of $20,000.

[14] In my view, there is no basis upon which to suggest that the jury's verdict was unreasonable. This ground of appeal must therefore be rejected.

E. DAMAGES

[15] Fourth, Mr. Lysenko maintains that the various awards for damages are too high. I do not accept these arguments.

(1) Mental Distress

[16] Regarding the mental distress damages, Mr. Lysenko argues that the jury award is wrong. Mr. Lysenko seems to be suggesting that the damages were

directed at the respondents' grief and, therefore, should not have been awarded. I do not accept this submission, as the mental distress claim was rooted in much more than the understandable grief experienced by the respondents.

[17] The quantum of damages reflected compensation for psychological injuries sustained by the respondents, not only because their daughter had died but also because she died in horrific circumstances witnessed by the respondents. Ultimately, the respondents had to make the difficult decision to remove Alisha from life support.

[18] Also, there was clear, expert evidence supporting both respondents' claims involving the mental distress they suffered as a result of their daughter's death. Notably, according to the psychological assessments of the respondents, following the death of Alisha, the respondent mother has "suffered a marked deterioration in her mood and daily functionality … and has also experienced passive suicidal ideation with previous serious contemplation of ending her own life", while the respondent father "is now experiencing exacerbated PTSD symptoms with persecutory anxiety". The respondents also testified in exquisitely painful detail at trial about what they saw, what they experienced, and how they had been impacted by the death of Alisha. Based upon all of that evidence, there is no basis to interfere with the award of $250,000 in mental distress damages to each respondent.

(2) Future Costs of Care

[19] The appellants also object to the jury's finding that the respondents are entitled to damages to address their future costs of care. Although not advanced in oral argument, Mr. Lysenko suggests in his factum that the respondents had not shown that they would require a damages award for their future costs of care.

[20] This position is contrary to the evidence at trial. For both of the respondents, the future costs of care awards were predicated on expert evidence, including in relation to their medication needs, counselling, and alternative treatment. The jury reduced the amounts substantially from what the experts suggested they should be, with the $403,247 suggested for the respondent mother reduced to $151,200 by the jury, and the $349,560 suggested for the respondent father reduced to $174,800 by the jury.

[21] In my view, there is no merit to this ground of appeal. The appellants do not object to the jury charge, only to the amounts awarded. Therefore, based upon the evidentiary foundation laid at trial, there is no basis upon which to interfere with the damages awarded for the respondents' future costs of care.

(3) Loss of Care, Guidance, and Companionship

[22] The appellants also challenge the jury's award for loss of care, guidance, and companionship. Mr. Lysenko claims that the award is simply too high, given that this court in *To v. Toronto Board of Education* (2001), 204 D.L.R. (4th) 704

(Ont. C.A.), at para. 37, established that $100,000 adjusted for inflation represents the "high end of an accepted range of guidance, care and companionship damages." Therefore, according to the appellants, the $250,000 awarded to each respondent for loss of care, guidance, and companionship goes against this court's established case law.

[23] In *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108, at para. 66, the Supreme Court of Canada drew upon and reinforced its decision in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 163, finding that in the context of non-pecuniary damages, an appellate court should only interfere with a jury's assessment where it "shocks the conscience of the court". In *To*, at para. 31, a 2001 case of this court involving damages for loss of care, guidance, and companionship, Osborne A.C.J.O. characterized the standard of review as follows: "In the circumstances where there was no error in the [jury] charge …, the jury's assessment must be so inordinately high (or low) as to constitute a wholly erroneous estimate of the guidance, care and companionship loss" (emphasis added). This standard was also used by this court in *Fiddler v. Chiavetti*, 2010 ONCA 210, 260 O.A.C. 363, at para. 77, and in *Vokes Estate v. Palmer*, 2012 ONCA 510, 294 O.A.C. 342, at para. 12.

[24] Whether using the language of *Young*, at para. 66, citing *Hill*, at para. 163 ("shocks the conscience of the court"), or *To*, at para. 31 ("so inordinately high … as to constitute a wholly erroneous estimate"), the message is clear: the threshold

for interfering with a jury's award of damages on appeal is "extremely high": *Vokes Estate*, at para. 12.

[25] Mr. Lysenko argues that this threshold is met in this case. He relies upon *To*, at para. 37, where this court established that $100,000 in February 1992 dollars "might be viewed as being the high end of an accepted range of guidance, care and companionship damages" (emphasis added). I would also note that almost 10 years after *To* was decided, in *Fiddler*, at para. 78, LaForme J.A. referred to the $100,000 quantum of damages awarded in *To* as "the high end of an accepted range for guidance, care and companionship damages." See also *Rodrigues v. Purtill*, 2019 ONCA 740, at para. 14. Properly adjusted for inflation using the consumer price index, the damages in *Fiddler* were decreased from $200,000 to $125,000, roughly representing the equivalent of the $100,000 awarded in *To* but in January 2005 dollars: *Fiddler*, at para. 80.

[26] If the *To* amount of $100,000 from February 1992 is adjusted for inflation to the date of Alisha's death in November 2013 using the consumer price index, it would amount to just shy of $150,000. Despite the difference between that indexed amount and the quantum of damages awarded in this case, the respondents contend that this court should not interfere, as the high standard for appellate intervention has not been met. I agree.

[27] First, it is important to recognize that, while Osborne A.C.J.O. referred to the $100,000 in *To* as perhaps being viewed at the “high end” of an accepted range for damages of this nature, he just as quickly pointed out that, unlike Alberta with s. 8(2) of its *Fatal Accidents Act*, R.S.A. 2000, c. F-8, for example, the legislature in Ontario did not establish an upper limit on these types of damages: *To*, at para. 29. In the absence of any such legislative cap, “each case must be given separate consideration” by the courts to determine the appropriate quantum of damages: *To*, at para. 30. Of course, locating the “right” amount for the loss of the guidance, care, and companionship of a child who has died because of another’s negligence verges on the near impossible to calculate, as the courts are called upon to measure the “immeasurable” and to calculate the “incalculable”: *To*, at para. 30, citing *Gervais v. Richard* (1984), 48 O.R. (2d) 191 (H.C.), at p. 201. See also *Fiddler*, at para. 76. Quite simply, there is no neat mathematical formula that can be applied to determine the correct amount.

[28] Second, despite the damages awards given in both *To* and *Fiddler*, both courts were careful to reinforce the idea that, like the absence of a legislative cap for damages of this nature, there is no judge-made cap for this form of non-pecuniary damages: *To*, at para. 29; *Fiddler*, at para. 76. While one can look to other guidance, care, and companionship assessments in similar cases to test the reasonableness of a jury’s determination of damages in any given case, these types of comparative exercises are not determinative of the outcome: *To*, at para.

31. To the contrary, “Each case must be considered in light of the evidence material to the guidance, care and companionship claims in that case”: *To*, at para. 31. This includes, as LaForme J.A. set out in *Fiddler*, at para. 77, considering each case “in light of the particular family relationships involved in that case”.

[29] This case-by-case approach to the quantification of damages for loss of guidance, care, and companionship will necessarily result in damages awards that will fluctuate. Coming back to the standard of review on appeal, it is only where the quantum of damages set by the jury “shocks the conscience of the court” or is “so inordinately high” that it is “wholly erroneous” that appellate intervention will be appropriate: *Young*, at para. 66, citing *Hill*, at para. 163; *To*, at para. 31.

[30] Therefore, while there is no question that the jury award for loss of care, guidance, and companionship in this case is high, in light of the factual backdrop of this case, it does not constitute an amount that “shocks the conscience of the court”: *Young*, at para. 66, citing *Hill*, at para. 163. Nor does it represent an amount that is “so inordinately high” that it is “wholly erroneous” in nature: *To*, at para. 31.

[31] Importantly, this is not a case where the appellants object to the jury charge itself. Rather, this case is strictly about the quantum determined by the jury. That quantum was clearly informed by how the jury saw the facts of this case. Alisha was an only child. Her parents were divorced when she was younger. Despite that divorce, the family remained unified by the common love the respondents had for

Alisha and that the respondents received from Alisha. While Alisha resided with her mother following the divorce, she would still see her father almost daily.

[32] Both respondents testified at trial about the strong relationships they had with Alisha. They also testified about how, as she reached adulthood and right up to the night before the fire, she provided her parents with love, affection, emotional support, and more. Indeed, the respondent father testified about how Alisha had been instrumental in seeing him through some very difficult mental health challenges involving PTSD: “She was my everything …. She was the reason why I … kept on going to get through that at that time.”

[33] In short, Alisha was a loving, supportive daughter who had already demonstrated that her dedication to her parents as she moved further into adulthood was strong, as she started giving more than she was receiving. The impact of a loss of one’s child was nicely captured by Robins J.A. in *Mason v. Peters* (1982), 139 D.L.R. (3d) 104 (Ont. C.A.), at p. 111, leave to appeal refused, [1982] S.C.C.A. No. 51, where he said:

> Whatever the situation may have been in earlier times when children were regarded as an economic asset, in this day and age, the death of a child does not often constitute a monetary loss or one measurable in pecuniary terms. The most significant loss suffered, apart from the sorrow, grief and anguish that always ensues from such deaths, is not potential economic gain, but deprivation of the society, comfort and protection which might reasonably be expected had the child lived – in short, the loss of the rewards of association which

> flow from the family relationship and are summarized in the word “companionship”.

[34] The November 20, 2013 fire destroyed all hope of the society, comfort, and protection that Alisha would give to her parents. The respondents never got to experience these rewards of association past Alisha’s 24th year. The fire eradicated their future together, ripping parenthood apart, the family away, and leaving both respondents childless.

[35] In light of the facts of this case, while the jury award was undoubtedly high, it was not “so inordinately high” that it would “shoc[k] the conscience of the court”: *Young*, at para. 66, citing *Hill*, at para. 163; *To*, at para. 31. In the circumstances of this case, there is therefore no basis to interfere with the jury’s award of $250,000 for loss of care, guidance, and companionship damages to each respondent.

F. FRESH EVIDENCE

[36] Lastly, Mr. Lysenko seeks the admission of fresh evidence on appeal, which evidence includes the unredacted records of the Toronto Police Service. The subject report was previously provided to the appellants’ counsel. Although Mr. Lysenko says that he did not know that the report was provided to his counsel, this is not the test applicable for adducing fresh evidence. Applying the criteria from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, the subject evidence is not sufficiently cogent to have in any way impacted the result at trial. At the end of the

day, Alisha found herself in a trap when the fire broke out. There was no working smoke alarm to alert Alisha to the need to get out quickly by the only possible exit. The jury's verdict turned on those facts. Therefore, the appellants' motion to adduce fresh evidence is dismissed.

G. DISPOSITION

[37] I would dismiss the appeal in its entirety and award costs in favour of the respondents in the amount of $30,000, inclusive of disbursements and applicable taxes.

Released: "JMF June 25, 2021"

"Fairburn A.C.J.O."
"I agree Harvison Young J.A."
"I agree M. Jamal J.A."