Elliott v. Hill Bros. Expressways Ltd., 1999 ABCA 61

Date: 19990222
Docket: 98-17814 & 17815

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE HETHERINGTON
THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MR. JUSTICE O'LEARY

BETWEEN:

LAWRENCE BRUCE ELLIOTT

Plaintiff/Defendant
(Respondent)

- and -

VANESSA ELLIOTT

Plaintiff
(Respondent)

- and -

HILL BROS. EXPRESSWAYS LTD. and
MICHAEL McGUIRE

Defendants
(Appellants)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE CLARK
DATED THE 15TH DAY OF MAY, A.D. 1998
FILED THE 4TH DAY OF JUNE, A.D. 1998

MEMORANDUM OF JUDGMENT

COUNSEL:

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For the Appellant Defendants

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For the Respondent Lawrence Elliott (17814)

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For the Respondent Lawrence Elliott (17815)

C. A. Rickards
For the Respondent Vanessa Elliott (17815)

MEMORANDUM OF JUDGMENT

THE COURT:

[1] The trial judge held the appellant truck driver and his employer (also an appellant) 100% to blame for a highway accident. The appellants' big truck and trailer ended up on their side across almost all of one direction of the divided highway. The respondent car driver managed to steer his automobile so as to avoid hitting that obstacle, but then lost control of his car, which rolled, injuring him and his wife.

[2] Counsel and three accident reconstruction experts analyzed the accident thoroughly. Counsel for the appellant truckers made many points in his factum, both factual and legal. Oral argument sharpened the focus.

[3] In his oral argument, appellants' counsel stated that he did not challenge the finding of negligence against his clients, unless we were to take a certain view of the law which he did not advocate. Nor did counsel for any respondent advocate that view of the law. Nor do we adopt it, as will be seen below. It is about the effect of an emergency upon contributory negligence.

[4] Accordingly, the part of the trial judgment under attack is that which does not ascribe any blame to the respondent car driver, nor find him guilty of contributory negligence.

[5] Counsel for the appellants did not argue orally that we should simply retry this question. Indeed, he recognized that it was unlikely that we would be in a position to decide contributory negligence finally, even if there were grounds to interfere with the trial judgment. His serious contention was that we should order a new trial because the trial judge had made important operative errors of law.

[6] We put to one side one alleged error of law. The trial judge began his Reasons by saying that one of the issues was whether contributory negligence would bar the suit. Curiously enough, he appears to have been accurately summarizing a well-known book on torts. But counsel for the appellants fairly conceded that the trial judge cannot have been unaware of the ***Contributory Negligence Act***, which for over sixty years has mandated apportionment of liability between the plaintiff and defendant. He did, however, point out that the trial judge's recital at the outset gave no details of the test for contributory negligence.

[7] No one seemed to dispute the correct test for contributory negligence: whether the plaintiff, in light of all the circumstances, had acted as a reasonable person would have. So we take the same view of the test here as does counsel for the appellants.

[8] He contends that the trial judge made and applied two serious legal errors. He suggests that they dictate a new trial. The alleged errors are

(a) Not seeing the applicability of the correct test (described in the previous paragraph), and

(b) Thinking that an emergency (so-called agony of the moment) is a legal bar to finding contributory negligence, whereas in law it is but one of a number of relevant factual circumstances which the trier of fact is to weigh.

[9] When finding that the respondent car driver was free of legal blame, the trial judge cited two reported cases on emergency/agony of the moment: ***Spratt v. Edm. (City)*** [1942] 2 W.W.R. 456 (Alta.), and ***Reineke v. Weisgerber*** [1974] 3 W.W.R. 97 (Sask.). Both state the law correctly, and no one suggests that the trial judge misquoted either.

[10] The most relevant part of the trial judge's Reasons, found almost at the end, is as follows:

> [46] Mr. McGuire [the defendant trucker] is the person whose negligence brought about or contributed to the creation of the emergency and he cannot escape liability by invoking this rule. This rule does have application however, with respect to Mr. Elliott [the plaintiff car driver] when he swerved to avoid the obstacle in his path - an action which resulted in the rollover of his vehicle. Mr. Elliott's over steering might amount to negligence in other circumstances, but in this case it is to be excused as it was carried out under the spur of a sudden emergency. Mr. McGuire was negligent and was thus liable for the accident that occurred on the evening in question. Hill Bros. Expressways Ltd. is vicariously liable pursuant to the provisions of Section 181 of the ***Highway Traffic Act*** Chapter H7 R.S.A. 1980.
>
> [47] Counsel for the Plaintiff has argued that the actions of Mr. Elliott were reasonable in the circumstances and that Mr. Elliott should not be found to be contributorial [sic] negligent for his behaviour when faced with a sudden emergency. I agree. In my opinion there was no contributory negligence on the part of the Plaintiff.
>
> [48] I am satisfied that this is a case of sudden emergency where the agony of an impending collision with the overturned tractor-trailer unit excuses Mr. Elliott from "adopting a remedial course which mature consideration demonstrates to have been mathematically proper". See ***Reineke v. Weisgerber and Whalley*** (1974) 3 W.W.R. 97 at 104.
>
> (Emphasis added)

[11] In the light of the discussion above, it can be seen that these paragraphs leave three things somewhat unclear. Two are questions of law, i.e. whether the trial judge made either of the legal errors described as (a) and (b) above. The third is a question of fact: whether the trial judge ever did subject the facts which he had found to the proper test (what a reasonable person would have done in all the circumstances of this particular case).

[12] To some degree, these three points interact, for what the trial judge thought he should do and what he did, obviously cause and illustrate each other, and give clues as to each other.

[13] The major source of ambiguity is the trial judge's use of the word "excuse" in his paras. 46 and 48. One may read that word, and a few other things, as possibly indicating legal error (b) (and so maybe indirectly indicating legal error (a)). In other words, did the trial judge mean to say that a plaintiff who was, in the circumstances, careless and acted unreasonably, still cannot be guilty of contributory negligence, if it all occurred in a sudden emergency not of his making?

[14] "Excuse" can mean that. But that is the second meaning of the word in the New Shorter Oxford English Dictionary (1993). It can also mean that the conduct in question is reduced in blameworthiness; i.e. that it is reasonable in a sudden emergency, even though it might not be reasonable without an emergency. That seems to be the first meaning in the New Shorter Oxford English Dictionary. In other words, "excuse" might refer to a legal effect: not penalizing carelessness. But it may also refer to characterizing facts as reasonably careful because of other facts. So "excuse" may also refer either to a factual decision, or a legal conclusion.

[15] Which interpretation of the trial judge's Reasons should this Court take? What should we do? In our view, seven considerations interact here.

[16] First, the trial judge correctly quoted the ***Spratt*** case. That says that the effect of an emergency is merely a question of fact, not a rigid rule of law.

[17] Second, para. 47 of the trial judge's reasons (quoted above) does two things:

(a) It applies what is admittedly the correct legal test (from argument) and it expressly agrees with that test.

(b) It makes a factual statement that the respondent plaintiff acted reasonably in the circumstances of this case.

It is hard to see why the trial judge would have written his para. 47 if he thought that his para. 46 gave a full legal answer and made reasonableness of conduct legally irrelevant.

[18] Third, Reasons for Judgment by a trial judge, after hearing full evidence, are to be read reasonably generously, and not ***contra proferentem***. This is not a clause on a ticket excluding liability. The trial judge has not even omitted the point; he has merely stated it briefly. Brevity of reasons is not itself proof of oversight.

[19] Fourth, the errors suggested by the appellants would be gross, and on very elementary questions of law. A legally-trained trial judge is not likely to make them.

[20] Fifth, a Court of Appeal must be slow to change a trial judge's view as to relative degrees of blame of the parties in a suit for negligence. That law is well-settled and binding.

[21] Sixth, fact findings are to be upset only for palpable and overriding error, even where expert evidence and reports are involved. That is even better settled.

[22] Seventh, Reasons for Judgment are to be read as a whole. We now expand on this last point.

[23] Though the passages quoted above are almost the only express discussion of contributory negligence by the trial judge, he wrote many earlier pages in his Reasons reviewing a lot of the evidence in detail. In the course of doing so, he made fact findings, some express and some plainly implied. There he also commented on evidence. In particular, he made findings, or accepted certain evidence, as to causation. And he seems to have commented on the evidence of experts as to blame (though that is not completely clear).

[24] In particular, the trial judge expressly rejected the evidence of the appellants' two accident reconstruction experts. They concluded that the respondent car driver had acted unreasonably and caused his own rollover. The trial judge expressly accepted the expert evidence of the expert called by the respondent car driver. That expert was also the R.C.M.P. Constable first on the accident scene, who investigated it immediately. The trial judge quoted extensively from that expert's evidence. That expert covered many of the topics which counsel for the appellants now objects are not express in the trial judge's reasons.

[25] During those reviews of the evidence, the trial judge made fact findings favourable to the respondent driver on these issues:

(a) his speed at various relevant moments;

(b) whether he was alert, and how quickly he saw and reacted to the overturned trailer;

(c) when and where he steered, especially just before his car rolled over (a topic on which the Constable/expert changed his initial opinion after reviewing the evidence);

(d) the cause of the rollover; and

(e) whether the test was how other drivers who encountered the overturned trailer fared.

[26] Therefore, one cannot conclude from the brevity of the passage quoted above, that the trial judge brushed off contributory negligence in a few lines. Nor did he fail to weigh how careful or careless, or reasonable or unreasonable, had been the respondent car driver's conduct in all the circumstances.

[27] Indeed, the trial judge had removed most or all of the factual supports from the appellants' argument for contributory negligence before he got to paras. 46-48 quoted above.

[28] Therefore, for all those seven reasons, especially the seventh, on balance we do not interpret the Reasons as showing basic legal errors. They can also be read as using the right tests. Indeed, it may be easier to read them (as a whole) as using the right tests.

[29] Without those alleged legal errors, there are either no factual errors, or none which can be called clear or palpable. And it is doubtful that any factual errors alleged would then be overriding.

[30] Therefore, given the narrow scope of review on appeal, the appeal must be dismissed.

APPEAL HEARD on November 6, 1998

MEMORANDUM FILED at CALGARY, Alberta,
this 22nd day of February, 1999

HETHERINGTON J.A.

CÔTÉ J.A.

O'LEARY J.A.