

CANADA / JUDGMENT

Abdi v. Burnaby (City)

2020 BCCA 125

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 125 Abdi v. Burnaby (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Abdi v. Burnaby (City),

2020 BCCA 125

Date: 20200504

Dockets: CA45454; CA45459

Docket: CA45454

Between:

Alla Abdi

Respondent

(Plaintiff)

And

City of Burnaby

Appellant

(Defendant)

And

Paul Bottomley and Roberta Bottomley

Respondents

(Defendants and Third Parties)

- and -

Docket: CA45459

Between:

Alla Abdi

Respondent

(Plaintiff)

And

City of Burnaby

Respondent

(Defendant)

And

Paul Bottomley and Roberta Bottomley

Appellants

(Defendants and Third Parties)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia,
dated June 26, 2018 (Abdi v. Bottomley, Vancouver Docket S147738).

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Place and Date of Hearing:

Vancouver, British Columbia

February 3-4, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 4, 2020

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Dickson

Summary:

The City of Burnaby and tenants of a residential property owned by the City, the Bottomleys, appeal following a jury's conclusion that they were liable for injuries sustained by the respondent Ms. Abdi in 2014. Contrary to a City bylaw and their tenancy agreement, the Bottomleys held an outdoor fire at their residence. Ms. Abdi was a guest sitting next to the fire. Without warning, Mr. Bottomley poured used motor oil on the fire, causing an explosion. Ms. Abdi suffered severe burns as a result. The City had knowledge that there was a previous outdoor fire at the Bottomleys' residence in 2008, with flames shooting 20 feet high. That fire was extinguished by the City's fire department and was the subject of a neighbour's complaint to the City. The City did not follow up with any inspection of the property despite having a policy to conduct safety inspections of its residential properties. The City did not demand that the Bottomleys remove the fire pit until after Ms. Abdi was injured, at which time the Bottomleys complied with the City's demand and ceased holding outdoor fires. The focus of the appeal was on the question of whether the injuries to Ms. Abdi were reasonably foreseeable. Held: Appeal dismissed. The judge did not err in refusing to grant the City's no evidence motion. There was evidence to support the conclusion that it was reasonably foreseeable to the City that if it failed in its duty of care, someone visiting the property might be injured by an outdoor fire at the property. Nor did the judge err in declining to put contributory negligence to the jury. There was no evidence to support a finding that the unsafe operation of the fire was reasonably foreseeable to Ms. Abdi and that she therefore failed to take care in accepting the invitation to sit with others next to it. The Bottomleys' argument that it was not reasonably foreseeable to them that pouring motor oil on the fire could cause an explosion fails to take into account that reasonable foreseeability is judged

objectively, from the standpoint of a reasonable person in the defendant's position. A reasonable person would know that motor oil is flammable and gives off fumes, and that pouring it onto a fire creates a significant risk of an unpredictable flammable reaction which could harm a person nearby.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] Alla Abdi is a young woman who was invited to a party at the home of the appellants, Paul and Roberta Bottomley, on the early evening of May 14, 2014. When she arrived, people were seated around an outdoor fire and she joined them. Without warning, Mr. Bottomley poured used motor oil onto the fire from a bucket. The oil exploded onto Ms. Abdi, and she became covered in flames from neck-to-toe. She began running around and tried to roll on the ground to extinguish the flames, but became entangled in a goalie net. She suffered severe burns and her life was forever changed.
- [2] The Bottomleys rented their home from the appellant, City of Burnaby (the "City"). The Bottomleys had a long history of having fires in the fire pit they created in their backyard, despite open fires being contrary to a City bylaw. Mr. Bottomley had often poured used motor oil on the fires the Bottomleys created, knowing this caused the fire to flare up. A neighbour reported concerns to the City about an outdoor fire at the Bottomleys' residence in 2008, stating that flames were as high as 20 feet. Someone called the City's fire department which came to the Bottomleys' residence and extinguished that fire.
- [3] Ms. Abdi brought a claim against the Bottomleys and the City in negligence and under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA]. The trial judge determined that each of the appellants owed a duty of care to Ms. Abdi as a question of law.
- [4] The questions of whether the appellants breached the standard of care and whether this caused or contributed to Ms. Abdi's damage, were put to the jury and they answered yes to both questions in respect of all of the appellants. They then assessed her damages. The jury was asked to assign a proportion of liability to the appellants, which they did: 66% to Mr. Bottomley; 5% to Mrs. Bottomley; and 29% to the City.
- [5] Prior to the charge to the jury, the trial judge was asked to rule on two motions:
 - a) a no evidence motion brought by the City, which the judge dismissed (indexed at 2018 BCSC 2331 ("Ruling #1")); and
 - b) a motion brought by Ms. Abdi to have the issue of her alleged contributory negligence and failure to mitigate not put to the jury, which the judge granted with respect to contributory negligence only (indexed at 2018 BCSC 2332 ("Ruling #2")).

- [6] On appeal, the City says the judge erred in dismissing the City's no evidence motion, and in granting Ms. Abdi's motion to not put the theory of her alleged contributory negligence to the jury. No issue is taken with the judge's charge to the jury.
- [7] Although the Bottomleys did not bring a no evidence motion below, they submit on appeal that there was no evidence on which the jury could properly decide that they were negligent.
- [8] The critical point raised by the appellants is whether the occurrence of an explosion following Mr. Bottomley's application of motor oil onto the fire, ought to have been reasonably foreseen by the appellants. Additionally, the City argues that if an explosion was reasonably foreseeable by the City, it ought to have been reasonably foreseeable by Ms. Abdi.
- [9] For the reasons that follow, I would dismiss the appeals. I have concluded that the appellants have framed the issue too narrowly, by focusing on the precise mechanism by which the injury occurred, namely, an explosion.
- [10] The proper question is whether the appellants ought to have reasonably foreseen that a personal injury involving fire might be caused by their actions and omissions. The answer to this question is yes. However, Ms. Abdi had no reason to have reasonably foreseen that the fire would be operated dangerously and she was not contributorily negligent.

Relevant Evidence at Trial

- [11] I will outline the evidence at trial that is relevant to these appeals.
- [12] In 2005, the Bottomleys rented a house from the City based on a written tenancy agreement, for a month-to-month term. The tenancy agreement provided amongst other things that the tenant would comply with the City's bylaws. The form of tenancy agreement remained in place up to and including the day of the incident.
- [13] The tenancy agreement provided that the City was responsible for some maintenance issues including responding to situations which pose an immediate health and or safety concern.
- [14] The tenancy agreement provided that the tenant would maintain the yard, including lawns, garden beds, shrubbery and hedges.
- [15] The City's administrator of its rental properties and tenant relationships, Ms. Brightman, testified at trial. She had worked in that role since about 2009.
- [16] Ms. Brightman acknowledged that the City understood that if there was something dangerous about a property it rented to tenants, it had a responsibility to fix it to make it not dangerous.
- [17] A City bylaw in place throughout the relevant time prohibited the lighting of any open fires, including in outdoor fireplaces (Ruling #1, para. 4). One of the reasons for the bylaw was so that fires would not cause harm to property and people.

- [18] Ms. Brightman understood that outdoor fires were not permitted, and would have been a contravention of the tenancy agreement. She understood an open fire had the potential to be an immediate health and safety hazard. She agreed that if tenants violated a bylaw, that would be grounds to start the process to evict them, after first giving them a warning to try and alter their behaviour.
- [19] As an example of this, after the incident giving rise to these proceedings, Ms. Brightman on behalf of the City wrote a letter to the Bottomleys on May 21, 2014, advising them of the bylaw which prohibited open fires, and of the term in the tenancy agreement requiring them to comply with the City's bylaws, for which failure to comply would be grounds for termination and eviction. By that letter, the City demanded that the Bottomleys remove all evidence of the fire pit and restore the area to its former condition.
- [20] From the time the Bottomleys rented the property until the date of the incident, City staff had been to the property approximately 20-25 times to perform maintenance. One example of work done by the City was installing a light switch to make the lighting of the driveway more convenient, so as to make it safe for the Bottomleys and their guests.
- [21] In 2008, the Bottomleys constructed a fire pit in their backyard, using a tire rim. The fire pit was affixed to the ground by gravity, and there was no evidence of it being moved after it was installed (Ruling #1, para. 104).
- [22] Mr. Bottomley stored used motor oil, from oil changes he would perform on his truck, in an approximately 20-litre bucket. Mr. Bottomley liked to pour motor oil from the bucket on the fires he would have in the fire pit. Over the years prior to the incident, he had approximately 40-45 fires in the fire pit, and he had poured motor oil on approximately 25-30 fires.
- [23] On New Year's Eve, December 31, 2008, the Bottomleys had a large fire in their backyard. I will refer to this as the "2008 fire". The City fire department was required to attend and extinguish the fire. There was no follow-up from the City, such as a demand that the Bottomleys remove the fire pit. Mr. Bottomley's evidence was that no one told him he could not have fires, even after the 2008 fire. He testified that he was not told it was illegal to have outdoor fires.
- [24] The 2008 fire alarmed one of the Bottomleys' neighbours, Ms. Derhousoff, also a City tenant. She wrote a complaint letter about this and other things to the City in September 2009, and Ms. Brightman received and read her complaint. The complaint letter stated that the 2008 fire was "huge" (emphasis in original), and that "[f]lames were going close to 20 ft. in the air." Ms. Derhousoff and Ms. Brightman had a telephone conversation about the subject of the complaint letter, with Ms. Derhousoff asking not to be identified as the person who made the complaint.

- [25] Ms. Derhousoff testified and confirmed her observations of the 2008 fire, that is, that it was very large with flames shooting about 20 feet into the air, which was near the trees behind the Bottomleys' house. The house bordered onto a forested area. She said she wrote the complaint letter hoping that the City would do something because she knew that fires were not allowed in residents' yards. She said that the Bottomleys continued to have fires in their yard after this.
- [26] It was Ms. Brightman's evidence that the City had a policy to conduct full safety inspections of all residential properties annually. The intention was to catch things that may have happened to the properties to make them unsafe, and to fix them. It was understood that there could be conditions inside or outside of the residence, to make the property potentially dangerous to tenants or visitors. She sent out reminders to the City's tenants annually, advising them that the City's maintenance coordinator would contact tenants and perform annual health and safety house inspections. However, the City did not employ sufficient staff to actually perform such annual inspections.
- [27] There was no such safety inspection of the Bottomleys' residence, inside or outside, during the material time, that is from the time of the start of their tenancy in 2005 through to the incident in 2014.
- [28] City staff did perform some maintenance and inspections of the Bottomleys' residence over the years. However, the City did not inspect the backyard where the Bottomleys had constructed the fire pit. The evidence was that the fire pit was obvious to anyone that walked into the backyard. The fire pit had chairs around it and since 2012, a nearby small greenhouse was used as a woodshed to store wood for it.
- [29] The City did not do anything about the Bottomleys having fires despite having received Ms. Derhousoff's complaint letter. Ms. Brightman visited the property within the year regarding another matter, but did not inspect the yard to see if there was any evidence of the Bottomleys having outdoor fires.
- [30] Mr. Bottomley was known to Ms. Brightman in her role with the City as not being the "friendliest of neighbours", as he had been involved in some neighbourhood disputes and the subject of two other City tenants' complaints regarding rude and intimidating behaviour. To try to quell these complaints, the City wrote a letter to the Bottomleys and the other two tenants on March 26, 2013, advising that if anyone was engaging in activities that intimidate, annoy or otherwise disturb their neighbours, it could force the City to terminate their tenancy. Ms. Brightman could not explain why that letter was sent to the Bottomleys in 2013, but no letter was sent in 2009 after receiving Ms. Derhousoff's complaint.
- [31] Mr. Bottomley testified that when the City fire department extinguished the 2008 fire, no one told him he could not continue to have fires or he would be evicted.

- [32] Mr. Bottomley at some point prior to the incident giving rise to these proceedings learned that a permit was needed to have outdoor fires but that he would not be eligible. Despite this, he continued to have fires in his backyard.
- [33] However, the Bottomleys' evidence was that if the City had told them to stop having fires and remove the fire pit or face eviction, they would have complied with both demands. The property had been their family's home since 2005, where they raised their children. At the time of the incident, the Bottomleys lived on the property with their three children, ages ranging from 13-24.
- [34] Indeed, after the Bottomleys received the City's notice and demand letter of May 21, 2014, they complied and dismantled the fire pit within a week or so and stopped having fires on the property.
- [35] Ms. Abdi testified at trial and was questioned about the fire on the night in question, as well as a gathering of young people she attended at Cultus Lake approximately a few days earlier, when there was also an outdoor fire. Ms. Abdi was 23 at the time of the incident.
- [36] Ms. Abdi went to the Cultus Lake gathering with her good friend, Ms. Shokrollah. There was a fire there that they were standing around, but they were not close to the fire. The Bottomleys' son, Sidney, was also there.
- [37] Ms. Abdi recalled a co-worker inviting her to the Bottomleys' house for a get-together after work. The co-worker was friends with Sidney Bottomley. Ms. Abdi went with Ms. Shokrollah. Her recollection is that they arrived around 9 p.m. or 9:30 p.m., and were the last to arrive. She recalled there being approximately 8-10 people present, hanging around in the backyard. There were people sitting around the fire pit and so she and Ms. Shokrollah joined them, as it was a little chilly out. Ms. Abdi was facing the fire talking to someone when she noticed Mr. Bottomley to her left tipping something big over onto the fire. Mr. Bottomley did not warn those present what he was about to do. Before Ms. Abdi could process what he was doing, he had already poured motor oil on the fire and it exploded on her immediately, and she was on fire. She described in detail the terrible burns she suffered and the devastating impact the injuries have had on her life.
- [38] Ms. Shokrollah also testified.
- [39] Ms. Shokrollah testified that there was a fire going at Cultus Lake when she and Ms. Abdi arrived. At the Cultus Lake gathering, Ms. Shokrollah saw one of the young men present drizzle a bit of liquid, from a bottle about the size of a water bottle, on the fire which had almost died out, but she did not see it cause any reaction. She said that everyone present was already far from the fire, perhaps 10 feet away, and the fellow warned that he was going to pour the liquid from the bottle onto the fire before doing so, warning people to back up. She said that she and Ms. Abdi backed up further from the fire when they got the warning.

- [40] Ms. Shokrollah said she arrived at the Bottomleys' residence together with Ms. Abdi on the evening of the incident, when there were already a number of people there, approximately 10-15. They saw the fire and it was a cold evening. They sat down by the fire with two other young women and a young man who were already there, and conversed with them. They were there only 10-15 minutes when she saw Mr. Bottomley come near the fire, pick up a big bucket, and pour the contents on the fire. It happened in only a few seconds and she wanted to scream to warn people but it was too late, he had already poured the contents of the bucket and people, including herself, were on fire. She had on a loose sweater with a zipper and so was able to get it off, and while she suffered some burns, they were not as severe as Ms. Abdi's.
- [41] Sidney Bottomley testified about the Cultus Lake gathering which he said was five days before the gathering at his family's home. He said that he poured used motor oil on the fire at Cultus Lake, after first telling those present he was going to do so. He said people did not back up after he warned them, and the fire flared up from the oil. He did not give any evidence as to what Ms. Abdi may have seen.
- [42] Sidney Bottomley was present early in the evening the night of the incident, but was not present when the accident occurred.

Judge's Ruling #1: No Evidence Motion

- [43] No issue is taken on appeal with the judge's description of the legal test on a no evidence motion under Rules 12-5(4)-(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, as follows:
- [9] The applicable test for a no-evidence motion is whether there is any evidence upon which the trier of fact can come to a conclusion regarding the fact that the plaintiff has sought to prove: *Roberge v. Huberman*, 1999 BCCA 196 [Roberge]. *Roberge* further clarifies the distinct roles of a judge and jury at para. 35:
- [35] It is for the judge to determine whether there is some evidence on each element of the cause of action required to be proved by the plaintiff; it is for the jury to determine whether that evidence is sufficient to justify a verdict for the plaintiff
- [10] In considering a no-evidence motion, the judge must decide whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge is not to consider the weight of the evidence or the credibility of witnesses. The evidence on the necessary elements is to be assessed only on the extent that is required to determine that the evidence amounts to more than mere speculation. If an inference which is essential to the plaintiff's case would be mere speculation, the defendant's no-evidence application should be granted: *Craigdarloch Holdings Ltd. v. Syscon Justice Systems Canada Ltd.*, 2010 BCSC 46.
- [44] The test to defeat a no evidence motion is whether the trier of fact could, not would, find in favour of the plaintiff: *Brule v. Rutledge*, 2014 BCCA 197 (Chambers).

- [45] In Ruling #1, the judge reviewed the City's arguments at length, to the effect that Ms. Abdi had failed to call evidence capable of establishing a cause of action against the City.
- [46] The cause of action against the City was based on its role as landlord, and breach of its statutory duties as well as a common law duty of care.
- [47] The City's statutory duties as landlord of the Bottomleys arose under the OLA and the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA]. The relevant sections were set out in Ruling #1 as follows:
- [14] Section 6 of the OLA provides the duty of care owed by a landlord to persons on the premises when that landlord is responsible for maintenance and repairs, and when a landlord is in default of their duty. It reads as follows:

6 (1) If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.

...

- (3) For the purposes of this section
- (a) a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,
 - (b) nothing relieves a landlord of a duty the landlord may have apart from this section, and
 - (c) obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.
- (4) This section applies to all tenancies.

[15] A landlord's obligations under s. 32 of the RTA are:

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

[48] And further:

[27] The OLA defines "premises" under s. 1(a) as:

- (a) land and structures or either of them, excepting portable structures and equipment . . .

- [49] The judge found that the City as landlord had some responsibilities for maintenance and repair of the premises. This meant the City had a duty of care towards persons on the premises pursuant to s. 6 of the OLA.
- [50] After reviewing the background facts and each side's arguments in detail, the judge's analysis began at para. 96 of Ruling #1. The judge summarized the City's arguments she had already reviewed in detail, as follows:
- [97] The City argues the following: there is no evidence that it was responsible for maintenance of the yard; Mr. Bottomley was a tenant and he caused the accident by pouring used motor oil on the fire; the Bottomleys have no actionable suit against the City; the cause of the accident was the Bottomleys' actions; the City committed no breach of duty under the OLA; the duty to repair and maintain the yard was that of the tenant; the City took care in respect of its duty to repair and maintain; and the accident did not occur as a result of the failure to repair and maintain, it arose entirely out of Mr. Bottomley's pouring used engine oil on the fire causing an explosion. The City is not responsible for the tenant's activities.
- [98] The City says the wheel rim, which acted as the fire pit, was a chattel and did not form part of the premises. Thus, s. 6 of the OLA does not apply.
- [99] In respect of the RTA, the City delegated yard maintenance to the Bottomleys. The residential tenancy complied with health, safety, and housing standards required by law.
- [100] In respect to foreseeability, the City said it had no knowledge that their tenant would pour used engine oil on a fire and cause an explosion. In respect of causation, Burnaby says if it breached its duty of care, none of its failures were the direct cause of the plaintiff's injuries. It was the pouring of the used motor oil on the fire that caused the plaintiff's injuries, not the existence of the fire pit or the fire itself.
- [101] The City says it owes no common law duty. There was no relationship of proximity or foreseeability. The bylaw does not create a higher duty on the City as a landlord, though perhaps on the tenant. There is no special relationship between the plaintiff and the City. Expert evidence is required to establish the requisite standard of care and in any event the bylaw was enforced, the fire department responded to the 2008 fire, and the Bottomleys stopped having fires for a period of time.
- [51] The judge rejected the City's submissions that it owed no statutory duty as follows:
- [102] The residential tenancy agreement provided that the City was responsible for maintenance and repair of the premises. Premises includes the land and the fixtures. The City sent out letters annually reiterating that the City was responsible for repairs and maintenance and indeed undertook them. The City enacted the bylaw so as to prevent harm to persons using the premises.

- [103] The City, I find, knew the Bottomleys had a fire in 2008 which was over 20 feet high. That was against the City's bylaw, and I find that Burnaby knew or ought to have known that the Bottomleys were having open fires due to the presence of a fire pit, which was obvious on any inspection of the yard. In spite of this, it allowed the fire pit to remain on the property until the incident occurred, eight years after the 2008 fire.
- [104] I consider that the fire pit was affixed to the ground by gravity and there was no evidence of it being moved at any time after it was installed, although the ground underneath it was modified. I find that the City was aware of the risk of a fire and the damage one could potentially cause.
- [105] I find that the matter is actionable by the tenant(s), if not Mr. Bottomley, perhaps Ms. Bottomley, and certainly the children, against the City.
- [52] The last sentence above was addressing s. 6(3)(a) of the OLA, which provides that a landlord is not in default of its duty unless the default would be actionable at the suit of the occupier. The judge implicitly recognized that Mr. Bottomley may not have had an action against the City due to his own conduct, but that his wife may have and certainly his children did due to the City's failure to require removal of the fire pit after the 2008 fire until the incident occurred. In addition, the judge's finding that the fire pit was affixed to the ground was a conclusion that the fire pit fell within the definition of premises under s. 1(a) of the OLA, for which the City had responsibilities under the OLA.
- [53] In terms of the City's conduct, the judge's findings concluded that the City: knew of the Bottomleys' 2008 fire which was over 20 feet high, contrary to the City's bylaw; knew or ought to have known that the Bottomleys were having open fires; and knew that fires were a risk and could potentially cause damage. The breach of the City's duty was in allowing the fire pit to remain on the property until the incident occurred.
- [54] The judge also analyzed the City's argument that it owed no common law duty of care.
- [55] Ms. Abdi argued that the City owed a duty of care under the test set out in *Cooper v. Hobart*, 2001 SCC 79, which relies on the framework set out in *Anns and others v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.). The judge summarized Ms. Abdi's submission as follows:
- [76] The first stage of the *Anns* test raises two questions. First, was the harm that occurred a reasonably foreseeable consequence of the defendant's act? Second, are there reasons, notwithstanding the proximity between the parties established in the first part of the test, that tort liability should not be recognized here? In answering the second question, the court must consider factors about the relationship between the plaintiff and defendant, which include questions of policy. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises.
- [56] The judge set out Ms. Abdi's argument on the issue of reasonable foreseeability:

- [77] The plaintiff argues that reasonably foreseeable does not mean probable or even possible. It refers to a real risk or one that could occur to the mind of a reasonable person in the position of the defendant and which they would not brush aside as far-fetched: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.
- [78] The plaintiff says Burnaby did not have to foresee the exact type of harm or the specific incident that occurred; rather, it had to foresee that harm could have occurred at all. The plaintiff argues that the harm to the plaintiff as a result of the incident was foreseeable by Burnaby, demonstrated by the fact that Burnaby passed a bylaw prohibiting fires to protect the safety of people and property. Burnaby knew or ought to have known that the Bottomleys had fires on the premises, one of which, according to a neighbour, had flames that reached 20 feet in the air; there was a fire pit present, based on its inspections; and the Bottomleys were problematic tenants.
- [57] In contrast, the City argued that the test of foreseeability was not met because it had no knowledge that Mr. Bottomley poured used motor oil on fires, and so could not foresee the event that caused the specific injury to Ms. Abdi, the explosion caused by pouring the motor oil on the fire. The City argued that a fire is not dangerous in and of itself unless improperly used (Ruling #1, paras. 41-45).
- [58] The judge found in Ms. Abdi's favour that the City did owe a common law duty of care and there was sufficient foreseeability, as follows:
- [106] At common law, I find that the Anns test applies, that it was reasonably foreseeable that the plaintiff was in sufficient proximity to the City, and there are no relevant policy considerations.
- [107] I find that there was a foreseeable risk that having open fires in a fire pit could cause personal injury. I agree that Burnaby had no basis upon which to foresee the exact circumstances, that is, that Mr. Bottomley would pour used motor oil on an existing fire and cause an explosion. However, I find the City was aware that an outdoor fire was a safety risk per the bylaw, and that the City had knowledge of both the 2008 fire and the presence of the fire pit for the purpose of having fires on the premises. There was sufficient foreseeability that someone could be injured in these circumstances.
- [108] In respect of proximity, I find that guests on the property were within the contemplation of Burnaby as the landlord. Burnaby created the bylaw to protect people, including visitors on the premises (City employees, contractors, and guests of the Bottomleys), from outdoor fires based on the knowledge that they can be dangerous and unsafe. This puts these guests in sufficient proximity to Burnaby.
- [109] I find that the plaintiff's circumstances were out of the ordinary, and that Burnaby preferred its commercial interest as landlord over compliance with its own bylaw.

[110] In respect of policy, I find that Burnaby has the onus of establishing a policy basis for why I should not find reasonable foreseeability and proximity. Such a basis has not been established here. Burnaby had a policy of doing safety inspections of the premises and did not do so. Nevertheless, the City was on the premises 20 to 25 times for other reasons between the beginning of the tenancy in 2005 and the incident in May 2014, with the fire pit being obvious to any onlooker from the time of its installation in 2008 onwards.

[Emphasis added.]

[59] Finally, in terms of causation, the judge held that had the City demanded that the Bottomleys remove the fire pit, they would have done so:

[111] In respect of the duty of care, I do not find that expert evidence was required, but rather that the OLA provides the requisite standard regarding causation. The Bottomleys were clear that if they were threatened with eviction due to their actions, including the use of the fire pit, they would have stopped.

[60] The judge also found that there was sufficient evidence of Ms. Abdi's damages.

[61] In the result, the judge concluded that there was sufficient evidence to put Ms. Abdi's claim in negligence against the City to the jury, and the judge dismissed the City's no evidence motion.

Judge's Ruling #2: Contributory Negligence

[62] In Ruling #2, the judge considered the question of whether to put to the jury the issues of Ms. Abdi's alleged failure to mitigate her damages, and contributory negligence. The parties on appeal take no issue with the judge's conclusion that mitigation would be put to the jury.

[63] The judge declined to put the issue of Ms. Abdi's alleged contributory negligence to the jury. The judge concluded:

[24] I find that there is no evidence upon which a jury properly instructed and acting reasonably could find for the defendants against the plaintiff on the issue of contributory negligence. It is mere speculation, even on the low threshold required. There is no evidence that the plaintiff demonstrated an absence of reasonable care by choosing to sit by the fire pit. The defendants must provide evidence in respect of both parts of the test of mitigation.

[64] It is agreed that the judge misspoke the last word of the above-quoted paragraph, and meant to say "contributory negligence" rather than "mitigation."

Issues

[65] The City submits that the judge committed three legal errors: (1) in applying the wrong test for reasonable foreseeability in determining the City's duty of care; (2) in not considering whether any evidence had been led at trial from which a jury, reasonably instructed, could find that Ms. Abdi's injury was caused in fact or in law by any breach by the City; and (3) in

applying different tests for reasonable foreseeability to the City and Ms. Abdi, and consequently finding a duty of care on the part of the City but not putting contributory negligence to the jury for Ms. Abdi.

- [66] The Bottomleys appeal on the basis that there was no evidence to support a finding that it was reasonably foreseeable to them that an explosion could occur, causing Ms. Abdi physical harm.
- [67] I will approach the issues by first examining the City's appeal for the dismissal of the no evidence motion, including its arguments on reasonable foreseeability and causation. I will then address the arguments regarding contributory negligence. Lastly, I will address the Bottomleys' argument that the explosion was not reasonably foreseeable to them.

Analysis

City's Appeal from Dismissal of No Evidence Motion

- [68] On appeal from the judge's dismissal of the City's no evidence motion, the City focuses on foreseeability, remoteness and causation. The City's arguments all hinge on the proposition that Mr. Bottomley's action in pouring used motor oil on the fire, causing an explosion, is the action which caused the harm, not any breach of duty by the City, and that Mr. Bottomley's action in so doing was too remote and not reasonably foreseeable to the City.
- [69] The judge agreed with the City's proposition that the City "had no basis upon which to foresee the exact circumstances, that is, that Mr. Bottomley would pour used motor oil on an existing fire and cause an explosion": Ruling #1, para. 107.
- [70] However, the judge did not consider this specific degree of foreseeability to be necessary to establish a duty of care on the part of the City. To repeat, the judge held, also at para. 107 of Ruling #1:

However, I find the City was aware that an outdoor fire was a safety risk per the bylaw, and that the City had knowledge of both the 2008 fire and the presence of the fire pit for the purpose of having fires on the premises. There was sufficient foreseeability that someone could be injured in these circumstances.

- [71] The City submits the above-described concept of foreseeability is in error as it is too general and not sufficiently specific. I disagree.
- [72] I am of the view that the judge's approach to foreseeability was correct.
- [73] The City does not appear to contest the judge's findings that the City owed some general duties of care as landlord, but takes the position that these duties were not relevant to Ms. Abdi's actual injuries.

- [74] In respect of the City's statutory duty under the OLA, the judge correctly found that the City had some responsibilities for maintenance and repair of the premises under the tenancy agreement (Ruling #1, para. 102). There was evidence that the City exercised these responsibilities over the years.
- [75] This brought into play s. 6 of the OLA, set out earlier: the landlord's duty in carrying out its responsibilities owed to persons on the premises was the same as the occupier's duty of care.
- [76] The duties of the occupier are described in s. 3 of the OLA and, in respect of the condition of the premises, include taking reasonable care to ensure that persons on the premises are reasonably safe, as follows:
- 3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
- (2) The duty of care referred to in subsection (1) applies in relation to the
- (a) condition of the premises,
- [Emphasis added.]
- [77] As landlord, the City also had a duty under s. 32 of the RTA to make repairs to ensure that the premises met safety standards required by law.
- [78] The evidence of the City's representative, Ms. Brightman, was consistent with the City having a duty to take action to remedy any known safety issue at one of its rental properties, for the safety of persons on the premises.
- [79] The standard of care under s. 3 of the OLA incorporates common law concepts of reasonableness. What steps will be reasonable will depend on the risk of harm. The greater the risk of harm, the greater the care required to protect against the risk: *Lawrence v. Prince Rupert (City)* and *B.C. Hydro & Power Authority*, 2005 BCCA 567 at paras. 21-22; *Boyes v. Wong*, 2016 BCSC 1085 at para. 146.
- [80] The question of what action by a landlord would be reasonable in the circumstances of a case, to keep a person on the premises reasonably safe, can be informed by the landlord's specific knowledge. For example, in *Jack v. Tekavec*, 2011 BCCA 464, leave to appeal ref'd [2012] S.C.C.A. No. 4, the landlord knew that the balcony railing was broken before the accident, but failed to repair it. The landlord was found liable to a person who leaned against the railing and fell when it gave way.
- [81] An open fire is inherently dangerous because it can be unpredictable and difficult to control, and if it harms someone, there is a great risk that the injury will be severe. It is commonly known that injury by burns can cause death or permanent disfigurement and a lifetime of

pain. Fire also creates a great risk of property damage. While some fires can be managed safely, the City would not know whether its tenants would act safely or recklessly with fire, and the risk of harm would be too great to allow tenants the freedom to hold fires at will. This is probably why the City had a bylaw prohibiting open fires, and a term in the tenancy agreement requiring the tenants to comply with all the City's bylaws.

- [82] The City learned that the Bottomleys' 2008 fire was described by a neighbour of the Bottomleys as "huge", with 20-foot flames, and it resulted in the City's fire department being called to extinguish the fire. The City argues that this does not mean the fire was dangerous, but I disagree. At a minimum, because of the 2008 fire the City had reason to believe that a reckless and dangerous outdoor fire had been held by the Bottomleys at the City's property.
- [83] I pause here to note that the judge made an error at para. 7 of Ruling #1, in stating that the 2008 fire resulted in some trees catching on fire. There was evidence of an earlier spontaneous tree fire, but not in relation to the 2008 fire. This was not an overriding error. This incorrect reference was made as part of the judge's recitation of background facts and did not play a part in her analysis of the issues. In her analysis of the issues, at para. 103 of Ruling #1, the judge referred to the 2008 fire and the 20-foot flames, but not to any trees burning.
- [84] The evidence was that the fire pit was installed in 2008. Since the complained-of fire was on December 31, 2008, it follows that the fire pit must have been there when the fire department members, who were City employees, attended at the property.
- [85] The 2008 fire and neighbour's complaint put the City on notice that an unsafe outdoor fire had occurred at the rental property, in breach of the terms of the tenancy agreement and the City bylaw, which were in place to ensure safety. Thus with respect to the property at issue, the City knew or ought to have known of a dangerous condition--the fire pit--which enabled this conduct.
- [86] The City had a policy of inspecting its residential properties for safety. The policy of inspection was consistent with a duty of care to do so, as part of its duty of care to maintain the property in a state of repair that complies with safety standards required by law (RTA, s. 32), as well as its broader duty under the OLA to take reasonable steps to keep persons on the premises reasonably safe: see, for example, *Tolea v. Ialungo*, 2008 BCSC 395 at para. 61; citing *Zavaglia v. Maq Holdings Ltd.* (1983), 50 B.C.L.R. 204 (Co. Ct.), *aff'd* (1986), 6 B.C.L.R. (2d) 286 (C.A.).
- [87] The May 21, 2014 letter from the City to the Bottomleys after the incident injuring Ms. Abdi, demanding removal of the fire pit and cessation of outdoor fire activities, confirmed that the City was able to take these reasonable steps to require that premises be restored to a safe state.

[88] I see no error in the circumstances of this case in the conclusion that the City owed a duty of care to visitors to the premises, including Ms. Abdi. The statutory framework supports the finding of the duty of care without the necessity of examining whether there was also a common law duty of care. This duty of care was informed by the City's knowledge that there had been a dangerous outdoor fire held on the premises. Its duty was to take reasonable steps to care for the reasonable safety of persons on the premises. These reasonable steps included taking steps to inspect the property in question for safety, in particular regards to the ability to hold outdoor fires, and upon inspection, taking steps to require the Bottomleys to remove the fire pit.

Reasonable Foreseeability and Remoteness

[89] The City argues that if Ms. Abdi had burned her hand in the fire, that might have been a reasonably foreseeable risk of any breach of its duty of care, but the risk of explosion due to motor oil being poured on the fire was so abnormal or remote to take it outside of reasonable foreseeability or beyond what could be said to be caused by the City's breach of its duty.

[90] In this regard, the City relies on *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19; *Childs v. Desormeaux*, 2006 SCC 18; and *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.

[91] Respectfully, I do not find these authorities to support the City's position in the circumstances of this case.

[92] In *Rankin*, an owner of a commercial garage in a small village left keys in one of the unlocked cars on his lot; the car was stolen by two youths; they got into an accident and one of the youths was seriously injured. The injured minor sued the commercial garage for negligence in leaving keys in unlocked cars. The risk of theft was reasonably foreseeable but that was simply a risk to property, not a risk of personal injury. The question was whether the garage owner should have considered the risk that the vehicle might then be operated in a dangerous manner, creating a risk of injury (at paras. 2, 34). The majority felt the latter risk was not reasonably foreseeable.

[93] In *Rankin*, the majority held:

[2] While the risk of theft was reasonably foreseeable, the evidence did not establish that it was foreseeable that someone could be injured by the stolen vehicle. Here, there was no evidence to support the inference that the stolen vehicle might be operated in an unsafe manner, causing injury. When considering the security of the automobiles stored at the garage, there was no reason upon this record for someone in the position of the defendant garage owner to foresee the risk of injury. I would allow the appeal. A business will only owe a duty to someone who is injured following the theft of a vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable.

- [18] It is not necessary to conduct a full Anns/Cooper analysis if a previous case has already established that the duty of care in question (or an analogous duty) exists: *Cooper*, at para. 36; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at paras. 5-6; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 26. If it is necessary to determine whether a novel duty exists, the first stage of the Anns/Cooper test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 39; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 12; *Cooper*, at para. 30. Once foreseeability and proximity are made out, a prima facie duty of care is established.
- [19] Whether or not a duty of care exists is a question of law and I proceed on that basis: *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, at p. 690. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a prima facie duty of care: *Childs*, at para. 13. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail: see, e.g., *Childs*, at para. 30.
- [24] When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged": *A. M. Linden and B. Feldthusen*, *Canadian Tort Law* (10th ed. 2015), at p. 322. This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff: p. 150; see also *Anns*, at pp. 751-52; *Childs*, at para. 25.
- [25] The facts of this case highlight the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. Here, the claim is brought by an individual who was physically injured following the theft of the car from Rankin's Garage. The foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).
- [26] Thus, in this context, it is not enough to determine simply whether the theft of the vehicle was reasonably foreseeable. The claim is not brought by the owner of the car for the loss of the property interest in the car; if that were the case, a risk of theft in general would suffice. Characterizing the nature of the risk-taking as the risk of theft does not illuminate why the impugned act is wrongful in this case since creating a risk of theft would not necessarily expose the plaintiff to a risk of physical injury. Instead, further evidence is needed to create a connection between the theft and the unsafe operation of the stolen vehicle. The proper question to be asked in this context is whether the type of harm suffered -- personal injury -- was reasonably foreseeable to someone in the position of the defendant when considering

the security of the vehicles stored at the garage.

[Underline emphasis in original; Italic emphasis added.]

- [94] As noted in *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2020 BCCA 86, the duty of care analysis in *Rankin* turned on whether there was sufficient evidence to establish that in addition to the foreseeable risk of theft, there was a foreseeable risk of unsafe operation of the stolen vehicle and its attendant risk of personal injury to the class of plaintiff that was damaged. This Court held in *Provost* that it was not foreseeable to a car dealership, whose negligence allowed a vehicle to be stolen, that persons would be injured by the driver more than an hour and a quarter later in the course of a police pursuit of the thief.
- [95] The duty of care of the City in the present case specifically relates to a duty to take care of the safety of persons who might come to the property. This is quite unlike the duty of the garage owner in *Rankin* and the car dealership in *Provost* which was related to protection of property from theft. In the present case, it was entirely foreseeable to the City that if it failed to take reasonable steps in fulfillment of its duty, persons coming to the property might be injured.
- [96] Further, in contrast to the facts in *Rankin* where there was no evidence to foresee that the car might be operated dangerously (there was some evidence to that effect in *Provost*), here the City knew that the Bottomleys had operated a dangerous outdoor fire (the 2008 fire). It therefore was reasonably foreseeable that the Bottomleys might not just have an illegal outdoor fire, but that it would operate the fire dangerously and someone at the property could be injured.
- [97] In discussing the concept of reasonable foreseeability, the majority in *Rankin* did not suggest that if the risk of a car accident and injury was reasonably foreseeable as a consequence of the car theft (for example, because of some prior knowledge that this had occurred on an earlier occasion), that the garage owner would need to foresee the precise manner in which the car accident and injury occurred. That kind of specificity would be analogous to what the City argues is necessary in the present case. To the contrary, in *Rankin* the majority focussed on whether the type of harm--personal injury as a result of dangerous operation of the vehicle--to the class of plaintiff damaged, was foreseeable, not whether the precise mechanism of injury was foreseeable.
- [98] I find the facts and approach in the case of *Hughes v. Lord Advocate*, [1963] A.C. 837 (H.L. (Scot.)), more apt than the very different facts in *Rankin* and *Provost*. In *Hughes*, workmen left open an unguarded manhole while they went on a break. The manhole was covered by a tent and surrounded by paraffin lamps. Two boys came upon the tent and, being curious, entered it. They knocked or lowered one of the lamps into the hole, it exploded, and a boy fell in the hole and suffered severe burns. The defendants argued, and the First Division of the Court of Session held, that the fact of the lamp being knocked over and causing an explosion was the true cause of the accident, and that it and the resultant damage was not

reasonably foreseeable.

[99] The House of Lords in *Hughes* disagreed with the court below and the defendant's approach, finding liability. The Court rejected the notion that because the injury was more serious and the result of an explosion, rather than a more modest mechanism of injury that might be more predictable, that it was not foreseeable. What was foreseeable was that some injuries might be suffered, and that sufficed to impose liability.

[100] As held by Lord Reid in *Hughes*:

It was argued that the appellant cannot recover because the damage which he suffered was of a kind which was not foreseeable. That was not the ground of judgment of the First Division or of the Lord Ordinary and the facts proved do not, in my judgment, support that argument. The appellant's injuries were mainly caused by burns, and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent it was very likely that they would take one of these lamps with them. If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable.

[Emphasis added.]

[101] The above passage, with its focus on the type of harm being foreseeable, is entirely consistent with the majority's approach in *Rankin*.

[102] Lord Jenkins in *Hughes* found the distinction between injury caused by fire, and injury caused by an explosion to be "too fine to warrant acceptance." I agree with these observations which are equally applicable in the present case:

It is true that the duty of care expected in cases of this sort is confined to reasonably foreseeable dangers, but it does not necessarily follow that liability is escaped because the danger actually materialising is not identical with the danger reasonably foreseen and guarded against. Each case much depends on its own particular facts. For example (as pointed out in the opinions), in the present case the paraffin did the mischief by exploding, not burning, and it is said that while a paraffin fire (caused, for example, by the upsetting of the lighted lamp or otherwise allowing its contents to leak out) was a reasonably foreseeable risk so soon as the pursuer got access to the lamp, an explosion was not.

To my mind the distinction drawn between burning and explosion is too fine to warrant acceptance. Supposing the pursuer had on the day in question gone to the site and taken one of the lamps, and upset it over himself, thus setting his clothes alight, the person to be considered responsible for protecting children from the dangers to be found there would presumably have been liable. On the other hand, if the lamp, when the boy upset it, exploded in his face, he would

have had no remedy because the explosion was an event which could not reasonably be foreseen. This does not seem to me to be right.

I think that in these imaginary circumstances the danger would be a danger of fire of some kind, for example, setting alight to his clothes or causing him bodily hurt. If there is a risk of such a fire as that, I do not think the duty of care prescribed in *Donoghue v. Stevenson* [[1932] A.C. 562 (H.L. (Scot.))] is prevented from coming into operation by the presence of the remote possibility of the more serious event of an explosion.

[Emphasis added.]

[103] In a similar vein, Lord Pearce in *Hughes* held:

The allurement in this case was the combination of a red paraffin lamp, a ladder, a partially closed tent, and a cavernous hole within it, a setting well-fitted to inspire some juvenile adventure that might end in calamity. The obvious risks were burning and conflagration and a fall. All these in fact occurred, but unexpectedly the mishandled lamp instead of causing an ordinary conflagration produced a violent explosion. Did the explosion create an accident and damage of a different type from the misadventure and damage that could be foreseen? In my judgment it did not. The accident was but a variant of the foreseeable. It was, to quote the words of Denning L.J. in *Roe v. Minister of Health* [[1954] 2 Q.B. 66, 85], "within the risk created by the negligence." No unforeseeable, extraneous, initial occurrence fired the train. The children's entry into the tent with the ladder, the descent into the hole, the mishandling of the lamp, were all foreseeable. The greater part of the path to injury had thus been trodden, and the mishandled lamp was quite likely at that stage to spill and cause a conflagration. Instead, by some curious chance of combustion, it exploded and no conflagration occurred, it would seem, until after the explosion. There was thus an unexpected manifestation of the apprehended physical dangers. But it would be, I think, too narrow a view to hold that those who created the risk of fire are excused from the liability for the damage by fire because it came by way of explosive combustion. The resulting damage, though severe, was not greater than or different in kind from that which might have been produced had the lamp spilled and produced a more normal conflagration in the hole.

[Emphasis added.]

[104] To borrow the language of Lord Pearce in *Hughes*, the accident by explosion in this case was but one variant of the type of misadventure that could reasonably be foreseen by the City. Here, what could be reasonably foreseen by the City if it breached its duty was that the Bottomleys would have another open fire, operate it dangerously, and a person present on the property could suffer personal injury in relation to the dangerous operation of the fire.

[105] The *Hughes* case was referred to by the Manitoba Court of Appeal in *School Division of Assiniboine South No. 3 v. Hoffer* (1971), 21 D.L.R. (3d) 608 (Man. C.A.), *aff'd* (1973), 40 D.L.R. (3d) 480 (S.C.C.). The facts involved a father teaching his 14-year-old son how to start a snowmobile improperly, when the son was not on the machine. The son attempted this

on his own and the snowmobile got away from him. The machine ran across a parking lot, struck a gas pipe servicing a school, the gas escaped, came through an air duct into the school, made contact with a pilot light or furnace flames, and exploded.

[106] The Manitoba Court of Appeal in *Assiniboine* concluded that the father and son owed a duty of care to those who might be damaged by the machine careening riderless around the countryside (at 612). The question was whether the damage was reasonably foreseeable. While damage by impact might be foreseeable, was damage by explosion?

[107] Using language similar to that in *Rankin*, the Court in *Assiniboine* concluded the damage was foreseeable, as it was of the "type" or "kind" that a reasonable person might foresee, even if the specifics of the accident were not foreseen. The Court per Dickson J.A. held at 614:

It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. In the case at bar I would hold that the damage was of the type or kind which any reasonable person might foresee. Gas-riser pipes on the outside of Tuxedo buildings are common. Damage to such a pipe is not of a kind that no one could anticipate. When one permits a power toboggan to run at large, or when one fires a rifle blindly down a city street, one must not define narrowly the outer limits of reasonable provision. The ambit of foreseeable damage is indeed broad.

[*Italic emphasis in original; underline emphasis added.*]

[108] To a similar effect, that the precise harm need not be foreseen, so long as harm in a general way could be foreseen: see also *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 56-57.

[109] The City relies on *Childs*, but I do not see it to be of any assistance in this case. That case was dealing with the novel tort of social host liability, owed to users of a public highway, when a guest drives intoxicated and causes an accident. The Court found no *prima facie* duty of care was owed by social hosts of a party to public users of a highway. In that case, there was no evidence that the hosts knew or ought to have known that their guest was intoxicated.

[110] The facts of *Childs* are quite unlike the facts of the present case. In this case there is an express statutory duty on the part of the City, as landlord, to take reasonable steps in relation to the condition of the premises, to keep persons at its residential premises reasonably safe, and there was knowledge by the City of an unsafe prior fire, based on the 2008 fire, which emphasized its duty to inspect to ensure there was no dangerous condition on the property. I am of the view there was evidence that the City breached its duty of care owed to persons on the premises, including Ms. Abdi, by failing to take reasonable steps to inspect and then to cause the fire pit to be removed. This would have prevented the Bottomleys' activity of operating dangerous fires.

- [111] In addition, the City relies on Mustapha to argue that the mechanism of injury that occurred here was too remote. However, that case is not at all on point. Mustapha decided that it was too remote to hold the defendant liable for the mental health injuries suffered by an unusually sensitive plaintiff. In the present case, it cannot be said that the injuries suffered by Ms. Abdi were too remote or unrelated to the wrongful conduct. She was not an unduly sensitive plaintiff. She suffered injury by burns from the dangerous operation of the fire, which was reasonably foreseeable to the City.
- [112] In short, I am of the view that the judge was correct in concluding that finding the City to owe a duty of care to Ms. Abdi in the circumstances of this case did not require that the precise mechanism or events that caused the injury be specifically foreseen. The City did not need to foresee that Mr. Bottomley would pour motor oil on the fire causing an explosion. Rankin makes it clear that it is only the type of harm that must be foreseeable.
- [113] Given its knowledge, in my view it was reasonably foreseeable to the City that if it failed to inspect the property, an unsafe condition might persist allowing for dangerous operation of an outdoor fire, which could injure a class of persons, namely, all persons on the property within proximity of the fire.

Causation

- [114] With respect to causation, the judge found that there was evidence that had the City carried out its duty, the Bottomleys would have stopped the fire activities (Ruling #1, para. 111).
- [115] The City advances a similar argument with respect to causation as it did with respect to foreseeability. It argues that Mr. Bottomley's actions and the explosion caused the injuries, not any breach of the City's duty. It argues that the "but for" test was not met by Ms. Abdi, who failed to show that but for the City's negligent act, the injury would not have occurred. It argues that Ms. Abdi would not have been injured but for Mr. Bottomley's act in pouring motor oil on the fire.
- [116] The City relies on Lawrence in which this Court cited Lord Reid in *Stapley v. Gypsum Mines Ltd.*, [1953] A.C. 663 at 681 (H.L. (Eng.)), as follows:

One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not.

- [117] For similar reasons as already expressed, I disagree with the City that there was no evidence that the City's breach of its duty of care caused the injury and that the injury was too remote.

- [118] There is ample precedent for concluding that where a government authority has a duty or policy to inspect property in part for safety reasons, and to demand action be taken to remedy an unsafe condition, and it fails to carry out inspection reasonably, that government authority may be liable in negligence if a person or property is harmed in a way that a proper inspection likely would have prevented: for example, *Anns; Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; and *Just v. British Columbia*, [1989] 2 S.C.R. 1228. This is so even though other persons may have a greater share of the responsibility in the chain of causation. The same can be said in this case with respect to the City's duties as landlord to inspect the condition of the property for safety of persons at the property.
- [119] The existence of the fire pit in the backyard was visible and obvious. It was open to a jury to find that if, instead of doing nothing after learning of the Bottomleys' 2008 fire, the City had instead fulfilled its duty of care and taken the reasonable step of conducting a safety inspection, the City would have detected the fire pit. It was open to a jury to conclude that, in further fulfillment of its duty, the City could easily have rectified the situation by ordering the Bottomleys to remove the fire pit and to cease the practice of starting open fires in their backyard, steps it later took after the incident. The Bottomleys testified that if the City demanded this, they would have complied; and indeed they did comply after the incident in response to the City's demand.
- [120] In other words, there is evidence to conclude that the fire which caused harm to Ms. Abdi never would have occurred if the City had acted reasonably to fulfill its duty of care after receiving notice of the unsafe fire (the 2008 fire) on the property leased to the Bottomleys, and had inspected the property and demanded removal of the fire pit: there would be no fire pit; no fire; and no opportunity for the Bottomleys to do something dangerous with the fire, causing injury by burns to someone present. There was therefore evidence capable of supporting the conclusion that but for the City's failure to take reasonable steps in exercise of its duty to keep persons on the property safe, Ms. Abdi would not have been harmed.
- [121] Before I complete my analysis of the City's grounds of appeal, I need to address the City's argument that the judge ought not to have determined the question of whether the City owed a duty of care on the no evidence motion before the City called evidence.
- [122] I would not accede to this argument. As the City submits, the question of whether a duty of care is owed is a question of law. The issue of reasonable foreseeability of harm is closely connected to the nature of the duty of care at issue. The judge was required on the City's no evidence motion to ask and answer the question of whether there was evidence of a duty of care owed by the City. All the relevant evidence had been heard on that issue, including the evidence of Ms. Brightman, Ms. Derhousoff and the Bottomleys. After the judge gave her ruling dismissing the no evidence motion, the City did not insist that the issue of duty of care should be revisited after it had the opportunity to call evidence.

Conclusion on the City's Appeal from Dismissal of the No Evidence Motion

[123] I am of the view the judge did not err in dismissing the City's no evidence motion. The City owed a duty of care to Ms. Abdi. The question of whether the City breached the standard of care was properly left to the jury. The evidence that the City did not take any steps to inspect or to address the Bottomleys having fires at the property, until after the incident, was uncontested. There was evidence that if the City had taken such steps, the Bottomleys would have removed the fire pit and ceased having fires on the property. There was therefore a reasonable basis for the jury to conclude that the City had breached its duty of care owed to Ms. Abdi, causing her injuries.

Appeal from Refusal to Put Contributory Negligence to the Jury

[124] The appellants wished to advance the defence of contributory negligence before the jury. When advanced as a defence, the theory of contributory negligence is that the plaintiff did not take reasonable care of himself or herself and contributed to his or her own injury: *Nance v. British Columbia Electric Railway Company Ltd.*, [1951] A.C. 601 at 611 (P.C.).

[125] In concluding that she would not put the issue of contributory negligence to the jury, the judge applied a similar test as she did on the no evidence motion: was there any evidence on which a jury, properly instructed and acting reasonably, could find for the appellants against Ms. Abdi on the issue of contributory negligence (Ruling #2, paras. 1-4, 24). No issue is taken on appeal with the judge's statement of the appropriate legal test.

[126] However, the City submits that the judge's analysis in Ruling #2, that there was no evidence to put to the jury on the issue of Ms. Abdi's contributory negligence, was in error in that it was inconsistent with the judge's earlier conclusion in Ruling #1 that there was evidence that the City had breached its duty of care to visitors to the property.

[127] The City advances the argument that the test for contributory negligence is dependent on foreseeability, relying on *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at para. 76:

The test for contributory negligence was summarized by Denning L.J. in *Jones v. Livox Quarries Ltd.*, [1952] 2 Q.B. 608 (C.A.), at p. 615:

Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

[128] The City submits that if the harm suffered by Ms. Abdi was reasonably foreseeable to it, then it was reasonably foreseeable to Ms. Abdi. This argument is based on two similar but slightly different perspectives:

- a) if the City's duty of care was based on the fact that fire is inherently dangerous, then Ms. Abdi also ought to have known that fire is inherently dangerous when she chose to sit down next to it; and,
- b) if the City's duty of care was based on the fact that it knew that there was a risk of some dangerous handling of the fire by persons at the property, based on the 2008 fire, then Ms. Abdi also knew or ought to have known there was a risk of dangerous handling of the fire.

[129] Both perspectives ignore the evidence.

[130] The evidence was that the City had specific knowledge that the Bottomleys had operated a fire dangerously on the property before, as evidenced by the neighbour's complaint of 20-foot flames and the necessity of the City's fire department extinguishing the 2008 fire. Ms. Abdi did not have this specific knowledge.

[131] Furthermore, the City's duty of care, as landlord with notice of dangerous fire activity being carried on at the property, cannot be viewed through the same lens as Ms. Abdi's duty to take reasonable care of herself.

[132] Ms. Abdi did not have the City's knowledge and duty to ensure the property was safe. She was a visitor, invited by the Bottomleys to socialize at the property. When she arrived, the presence of seating and others around the fire pit was not only an invitation to sit next to the fire, it would also have served as a reassurance that the fire itself and the operation of it was safe. Unlike the City, she had no reason to believe that the Bottomleys were doing anything wrong in having a fire at the property, or had in the past operated a fire unsafely. She had never been to the Bottomleys' residence before. Her evidence was clear that she did not see Mr. Bottomley pour motor oil on the fire until the one time it exploded onto her.

[133] The City suggests that Ms. Abdi ought to have known there was a risk that the fire would be operated dangerously.

[134] The City points to:

- a) evidence that Ms. Abdi was present at an outdoor fire approximately five days earlier at a different location (Cultus Lake) with a group of friends, and that Mr. Bottomley's son poured an accelerant on that fire; and
- b) evidence that Mr. Bottomley poured motor oil on the fire on the evening in question three times, and it was only the third time that the explosion and injuries occurred.

[135] The judge found with respect to the Cultus Lake fire:

- [21] The defendants also refer to the camp fire at Cultus Lake that Ms. Abdi attended shortly before the May 14, 2014, incident, where Sidney Bottomley poured oil on the fire as Ms. Abdi and others were sitting or standing close by, within a couple of feet according to Sidney Bottomley's evidence.
- [22] If Ms. Abdi saw Sidney pour oil on the fire at Cultus Lake, which is not clear in the evidence, the situation was markedly different. Sidney Bottomley warned everyone present that he was putting oil on the fire. Whether Ms. Abdi saw him do that or whether she was close to the fire was not established in the evidence.
- [136] The judge's summary of evidence regarding the Cultus Lake fire has not been shown to be in error. No reasonable interpretation of the evidence of what occurred at Cultus Lake would have put Ms. Abdi on notice that it was dangerous to sit by the fire at the Bottomleys' property.
- [137] As for the events around the Bottomleys' fire before the incident, the judge found:
- [17] The defendants refer to the evidence of Paul Bottomley that he poured oil on the fire on the evening of May 14, 2014, three times, and that Ms. Abdi and others were sitting around the fire when Mr. Bottomley poured oil on the fire a second time.
- [18] I note parenthetically that it was the third time that he poured oil on the fire that the explosion erupted and injured the plaintiff. Mr. Bottomley's daughter, Jacqueline Bottomley, said the same thing.
- [19] The defendants say that if the plaintiff's position is that fire and the existence of the wheel rim or fire pit is inherently dangerous, especially where there is someone reckless around it, then it was negligent of the plaintiff not to remove herself from the fire pit and the fire.
- [20] I have reviewed the evidence that is contained in my notes. There is no evidence that Ms. Abdi saw Mr. Bottomley put oil on the fire before the third time that caused the explosion. Even if she was present for the second pour, Paul and Jacqueline Bottomley resiled from their evidence that Ms. Abdi was there for the second pour in cross-examination. Neither of them could say that one of the girls present for the second pour was Ms. Abdi.
- [23] All of those who were present on May 14, 2014, who gave evidence, including the Bottomleys, who knew that oil would be poured on the fire, did not perceive it to be dangerous to be near the fire. Ms. Abdi and Ms. Shokrollah gave evidence that they were seated at the fire for just a few minutes before Mr. Bottomley poured the oil onto it. They both perceived immediately that it was dangerous. Ms. Abdi said she did not have time to react before the explosion took place. Neither Ms. Abdi or Ms. Shokrollah were aware of what Mr. Bottomley was doing. Mr. Bottomley issued no warnings before he poured oil on the fire.

[Emphasis added.]

- [138] I have reviewed the evidence and conclude that the judge was correct in her summary above.
- [139] On appeal, the City relies on a strained interpretation of the evidence of the Bottomleys' daughter, Jacqueline, to suggest that there was some evidence that Ms. Abdi was present at the fire for Mr. Bottomley's second pour of motor oil.
- [140] Jacqueline Bottomley's evidence in direct was that no one was around the fire when her father first poured motor oil on it. She claimed that Ms. Abdi and Ms. Shokrollah were around the fire at the time of the second pour, and she did not see the third pour because she was in the garage. Regardless, she did not testify that Ms. Abdi actually saw the second pour of motor oil on the fire.
- [141] In cross-examination, Jacqueline Bottomley repeated her evidence that she saw Ms. Abdi and Ms. Shokrollah at the fire at the second pour of motor oil on the fire, although she could not remember what clothes they were wearing. However, she equivocated in her evidence: when asked twice if she agreed that Ms. Abdi and Ms. Shokrollah were not there at the time of the second pour she twice stated "[s]ure." When asked if she met with her father in advance of testifying to try to get their stories straight, and made up some of her evidence to help her mother and father avoid responsibility for the lawsuit, she also agreed "[s]ure." When asked if her father would have better knowledge and memory of who was there or not there when he was pouring the motor oil, she also agreed.
- [142] Mr. Bottomley's evidence was that he started the fire on the night in question around 8 p.m. He claimed that when he poured the motor oil from a 20-litre bucket on the fire on the first occasion, there was no one sitting or standing around it. He said in his direct evidence that he "believe[d]" Ms. Abdi and Ms. Shokrollah were around the fire at the time of the second pour, but that nothing occurred when he poured the motor oil on the fire.
- [143] Mr. Bottomley resiled from his evidence as to who was present at the second pour, agreeing in cross-examination that he did not know who was sitting around the fire when he applied the second pour, just that there were two girls and he did not remember if Ms. Abdi was one of them. I note his evidence that there were two girls sitting there at the time of the second pour is consistent with Ms. Shokrollah's evidence that when she and Ms. Abdi came to the Bottomleys' residence, there were already two young women sitting around the fire and they joined them only a few minutes before the pour and explosion (making the number of young women present around the fire, at the time of the third pour of motor oil, four).
- [144] Mr. Bottomley admitted in cross-examination that he did not tell anyone at the gathering that he was going to pour motor oil on the fire, and took no steps to warn them.

- [145] Even if one were to accept for argument's sake that there was some evidence that Ms. Abdi might have been at the fire at the time of the second pour, there was no evidence that Ms. Abdi knew that Mr. Bottomley had poured motor oil on the fire or that he was going to do so. There was no evidence she saw anything other than a small controlled fire.
- [146] If the City was going to rely on the proposition that Ms. Abdi saw Mr. Bottomley pour the motor oil on the fire once before the pour that resulted in the explosion, I would have thought that the City would put that proposition to her in cross-examination, but this was not done.
- [147] Rather, counsel for the City put to Ms. Abdi in cross-examination, and she agreed, that she had only been at the fire for a few minutes before the explosion occurred, during which time she was engaged in conversation with a friend, and that Mr. Bottomley did not give any warning he was going to pour motor oil on the fire. This was consistent with the evidence of Ms. Shokrollah, that they were only seated around the fire for a few minutes before, without warning, Mr. Bottomley poured motor oil on the fire and it exploded.
- [148] Reasonable foreseeability has to be assessed from a person in the defendant's position. There is a distinction between the City's position and Ms. Abdi's. The City prohibited fires under its own bylaw and the City had specific knowledge that the Bottomleys had recklessly disregarded that bylaw, in breach of their tenancy agreement, and held an unsafe outdoor fire in the past. Ms. Abdi had no reason to know that the Bottomleys were behaving recklessly by having an illegal fire and no reason to foresee that this outdoor fire would be unsafe. Some fires can be managed safely.
- [149] In short, on all the evidence, Ms. Abdi did not have any reason nor time to react to take reasonable care by moving away from the fire, because she had no warning that the Bottomleys behaved recklessly with fires, and no knowledge of what Mr. Bottomley was about to do.
- [150] I find no error in the judge's conclusion that there was no evidence by which a jury, properly instructed, could reasonably conclude that Ms. Abdi failed to take reasonable care by sitting by the fire.
- [151] I would therefore not accede to this ground of appeal.

Bottomleys' Appeal

- [152] I turn to the appeal by the Bottomleys.
- [153] Leaving aside reasonable foreseeability of the harm that befell Ms. Abdi, the Bottomleys do not argue on appeal that they did not owe Ms. Abdi a duty of care. Certainly it is not difficult to conclude that the Bottomleys had a duty to be mindful of the safety of visitors to the property.

- [154] The Bottomleys say there was no evidence on which the jury could conclude that it was reasonably foreseeable to them that pouring motor oil on a fire could cause an explosion. This is because Mr. Bottomley had poured motor oil on fires in their backyard many times before, some 25-30 times, and the Bottomleys say it had never caused an explosion before.
- [155] With respect, this argument fails to appreciate that reasonable foreseeability is judged objectively, from the standpoint of a reasonable person in the defendant's position. It is not judged from the subjective perspective of whether the harm was in fact foreseen by the defendant. Typically negligence cases involve unfortunate accidents. One hopes that in most cases if harm was actually foreseen by a person, the person would refrain from the harmful act.
- [156] As held in Rankin:
- [53] Whether or not something is "reasonably foreseeable" is an objective test. The analysis is focussed on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of 20/20 hindsight: L. N. Klar and C.S.G. Jefferies, Tort Law (6th ed. 2017), at p. 212.
- [Italic emphasis in original; underline emphasis added.]
- [157] Mr. Bottomley knew that Ms. Abdi and other people were sitting next to the fire when he deliberately poured motor oil from a large container onto the fire, without warning.
- [158] A reasonable adult would appreciate that motor oil is a highly flammable substance and that it gives off fumes. It would be obvious to any reasonable person that pouring motor oil from a bucket onto an open fire creates a significant risk of an unpredictable flammable reaction which could harm anyone or anything nearby.
- [159] Furthermore, Mr. Bottomley admitted knowing that when he poured motor oil on the fire, it sometimes created "flare up[s]". He knew oil was combustible, that it burns quicker than wood, and one reason he put it on the fire was to make the fire bigger. He therefore had direct knowledge that his conduct would create a flammable reaction that was inherently unpredictable and dangerous.
- [160] As explained above, reasonable foreseeability does not require that the precise mechanism of injury be foreseen. What was foreseeable was for the fire to have a flammable reaction to the motor oil, creating a risk of injury. The explosion was just such a flammable reaction, causing injury by burns. Injury by burns as a result of pouring motor oil on the fire was objectively foreseeable to a reasonable person.
- [161] In short, there was sufficient evidence to establish reasonable foreseeability of personal injury to Ms. Abdi.

[162] A defendant's conduct is negligent if it creates an unreasonable risk of harm: Mustapha at para. 7.

[163] The risk of a severe injury from fire is so serious that it requires greater care by persons handling the fire. Children learn early on that playing with fire is very dangerous. Even Mr. Bottomley's son knew to warn people before he poured motor oil on a fire.

[164] Mr. Bottomley may not have intended harm, but a reasonable person in his position would know that he was taking an unreasonable risk with the lives and safety of those who visited his property on the night in question. Mrs. Bottomley contributed to that risk, as she knew it was her husband's practice to pour motor oil on a fire and did nothing about it when hosting guests around the fire.

[165] I would not allow the Bottomleys' appeal.

Conclusion

[166] The risk that Ms. Abdi would be injured by the appellants failing to take reasonable care was reasonably foreseeable to the appellants. Mr. Bottomley's reckless handling of the fire leading to Ms. Abdi being injured by burns was not too remote to be reasonably foreseen by the appellants. There was evidence to support the jury's conclusions that the City and the Bottomleys breached their respective duties of care owed to Ms. Abdi, causing her damages. There was no evidence that Ms. Abdi failed to take reasonable care for her own safety. I would therefore dismiss the appeals.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Dickson"

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