

CANADA / JUDGMENT

Tepel v. Membreno-Navarrete

2024 BCSC 663

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 663 Tepel v. Membreno-Navarrete

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tepel v. Membreno-Navarrete,

2024 BCSC 663

Date: 20240424

Docket: S183238

Registry: Vancouver

Between:

Laura Lynn Tepel

Plaintiff

And

David Membreno-Navarrete, Nelly Membreno

and Fila Membreno

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for the Plaintiff:

J.P Cahan

The Defendant, appearing in person:

David Membreno-Navarrete

Counsel for the Defendants Nelly and Fila Membreno:

R.D. Irving

Place and Date of Hearing:

Vancouver, B.C.

April 9, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2024

Introduction

- [1] In this action, the plaintiff seeks damages against the defendant David Membreno-Navarrete in relation to his alleged physical assault of her that occurred in a room in his parents' home on February 29, 2016. His parents are Nelly and Fila Membreno, the applicants before me. The plaintiff seeks damages against the parents in negligence and pursuant to the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA] for failing to take steps to protect her against Mr. Membreno-Navarrete while she was in their home located at 13134 72 Avenue, Surrey, B.C.
- [2] This is an application for severance of the issues relating to the parents, and for judgment under R. 9-7 of the Supreme Court Civil Rules in relation to those issues.
- [3] The applicants state that the claim against them requires the plaintiff to prove that the parents had knowledge of a foreseeable risk to her physical safety posed by their son, and had a duty to take reasonable steps to protect her from such risks while she was in their home. The plaintiff agrees with the applicants' articulation of the legal test she must meet on the question of liability.
- [4] The parties also agree that the question of severance must be determined first. If severance is granted, the Court must then determine whether the liability issues against the applicants may be dealt with by way of summary trial. If I determine these issues are suitable for determination by way of summary trial, I will then proceed with a determination of the liability issues against the applicants.

Severance

- [5] In an application pursuant to R. 9-7, where a party seeks to have only a portion of the claim determined on a summary basis, the applicant must meet the test for severance, as well as suitability: *Thomas v. The Roman Catholic Archbishop of Vancouver*, 2016 BCSC 1466. An applicant for severance must establish extraordinary, exceptional, or compelling reasons for severance: *Chun v. Smit*, 2011 BCSC 412.
- [6] The decision to grant severance is discretionary and the Court may consider any relevant factors, including those set out by the court in *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2009 BCSC 1592 at para. 16:
1. Is there evidence that severance is likely to result in a significant saving of time and expense?
 2. Is there some evidence that a severed trial will put an end to the action?
 3. Are the issues of liability and damages intertwined?
 4. Is there a compelling reason to justify severance other than savings of time and expense?
- [7] The applicants submit that the issues against them, as owners of the house in which the assault is alleged to have occurred, are discrete from the issues against their son. Further, a determination of their liability does not require any findings of fact in relation to the alleged assault itself, or the damages suffered by the plaintiff.
- [8] The applicants submit that including them in the trial will increase the trial time, not only because of the discrete issues against them but also because they do not speak English and will require interpreters. They estimate that if the issues against them are determined by way of summary trial, the trial time will be reduced by approximately five days. The plaintiff did not take issue with this estimate.
- [9] The applicants submit that the assessment of damages in this case will be complex, due to pre-existing health issues and ongoing heavy alcohol consumption by the plaintiff. It is expected that a number of experts will be required to defend the plaintiff's claim for damages. If I find that the applicants are not liable to the plaintiff, they will not have to participate in any part of the damages portion of the trial, which will shorten trial time.
- [10] The applicants also submit that the prospects of settlement are low while a legal determination of the applicants' liability is outstanding.
- [11] The applicants submit that there will be significant savings of time and expense if the liability issues against them can be determined in advance of the claim against Mr. Membreno-Navarrete. If they are successful in their summary trial application the claims against them will be at an end, and they will not need to participate in the damages portion of the trial. The issues of liability against them are independent of the liability issues against their son. All of these factors result in a compelling reason to justify severance.

- [12] The plaintiff submits that caution must be exercised in making any orders for severance, and such orders ought to be made infrequently and carefully to ensure that the litigation is not proceeding in slices: *Kitsul v. Slater Vecchio LLP*, 2015 BCSC 1394; *The Owners, Strata Plan VIS 3815 v. Polo Pacific et al.*, 2003 BCSC 1811.
- [13] I am satisfied that the liability issues in relation to the applicants are discrete from those against Mr. Membreno-Navarrete. Whether the applicants, as home owners, in the circumstances of this case owed a duty of care to the plaintiff, and breached that duty of care, are issues entirely separate from the issues between the plaintiff and Mr. Membreno-Navarrete. The question of damages is not intertwined with the facts and issues in relation to the liability issues against the applicants.
- [14] I accept that the fundamental issue in the claims against the applicants is whether the actions of Mr. Membreno-Navarrete were reasonably foreseeable such that they, as home owners, had a legal obligation to take some steps to protect the plaintiff from harm while she was in their home. This issue will be determined on facts which predate the alleged assault, namely any history of violence on the part of Mr. Membreno-Navarrete which would make an assault by him against the plaintiff reasonably foreseeable.
- [15] In contrast, the issues between the plaintiff and Mr. Membreno-Navarrete relate to the actions he took against the plaintiff on February 29, 2016, and at other times after February 29, 2016, as outlined in the notice of civil claim.
- [16] I agree that the determination of the issues against the applicants in advance of trial will result in a savings of court time, including because their evidence will not have to be interpreted during the trial itself. If the applicants are successful, the action against them will be at an end. If they are not successful, their involvement in the trial would be limited to their challenge to the plaintiff's damages claim. I find that the trial of the liability issues against the applicants will result in a significant savings in time and expense.
- [17] On balance, I find that the applicants have established compelling reasons for severance, and an order for severance is appropriate in this case. I order that the liability issues in relation to the applicants will be determined in advance of the trial.

Summary Trial

Suitability

- [18] In an application for judgment under R. 9-7, the Court must be satisfied that it would be suitable for the proposed issues to be determined on a summary basis. The considerations in a suitability analysis include:
- a) the amount involved;
 - b) the complexity of the matter;

- c) its urgency;
- d) any prejudice likely to arise from delay;
- e) the cost of taking the case forward to conventional trial in relation to the amount involved (described as "proportionality");
- f) the course of the proceedings;
- g) whether the evidence is sufficient to decide the dispute; and
- h) any other relevant factors.

See *Cepuran v. Carlton*, 2022 BCCA 76, at paras. 149-150, citing *Inspiration Management. Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.)

[19] In this case, the applicants and plaintiff have concluded their discoveries of each other. There is no suggestion that document discovery as between these parties is incomplete.

[20] The plaintiff submits that it is not appropriate to determine the issues against the applicants at this time. The plaintiff notes that she has not yet discovered Mr. Membreno-Navarrete, and only recently received a copy of the police file, which she says she needed in order to discover Mr. Membreno-Navarrete. The plaintiff also submits that there are serious credibility issues which cannot be properly determined on the affidavits before me, and require viva voce testimony.

[21] With respect to the police file and the need to discover Mr. Membreno-Navarrete, it is not clear to me what bearing these matters have on the issues against the applicants. The plaintiff agrees that the foreseeability of risk to the plaintiff from Mr. Membreno-Navarrete's actions is the critical issue in the case against the applicants. The plaintiff points to a statement made by Mr. Membreno-Navarrete to the police in an investigation in 2018, which she says underscores the need for further discovery. The statement was not admitted for its truth, but simply to persuade me that the details disclosed reveal the need for further exploration. There is no question that the statement will be relevant to the case against Mr. Membreno-Navarrete. However, the statement covers the alleged assault in February 2016, and also their relationship in general, which continued for more than a year after the assault. Nothing in the statement suggests that incidents of violence took place in front of the applicants. Nothing suggests the affidavits and evidence already obtained from the applicants are incorrect or misleading.

[22] The notice of civil claim was filed in 2018, and counsel for the applicants pointed out that he was the one who took steps to obtain the police file in 2023. It took almost one year for the police file to be produced. However, plaintiff's counsel agreed that there was nothing preventing him from obtaining the police report in the five years between 2018 and 2023.

- [23] Counsel for the applicants discovered the plaintiff in May 2021, and advised the plaintiff in September 2021 that they intended to bring on an application for summary judgment. Counsel advised me that at no time in advance of this hearing did counsel for the plaintiff advise that the police file was required for the discovery of Mr. Membreno-Navarrete, and that the summary trial could not proceed until the police file was obtained.
- [24] Regardless of the positions of counsel, I am satisfied that there has been ample time for the plaintiff to marshal whatever evidence she needs in preparation of her case. This is not a case where the applicants have rushed to bring on this application.
- [25] With respect to credibility issues, the plaintiff points to what she says are conflicts in the evidence as to how well she knew the applicants, and whether the applicants knew Mr. Membreno-Navarrete was a heavy drinker and used drugs.
- [26] The plaintiff says in her affidavit that she spent a lot of time with Mr. Membreno-Navarrete and his parents. She describes them attending many birthdays and parties at the home, and Mr. Membreno-Navarrete being intoxicated frequently. The plaintiff and Mr. Membreno-Navarrete began a serious relationship in November 2015, and the alleged assault took place in February 2016. The couple continued their relationship until early 2017. It is not clear from the plaintiff's affidavit how much time she spent with the applicants in the few months before the alleged assault, which is the relevant time in relation to any potential liability on the part of the applicants.
- [27] The applicants acknowledge that the plaintiff came to the house at the invitation of Mr. Membreno-Navarrete, and that the plaintiff attended a birthday party and Christmas at the house. However, they stated they did not have much contact with the plaintiff. On discovery, both applicants stated they had never observed Mr. Membreno-Navarrete intoxicated, and did not know that he had a licence suspension because of alcohol use.
- [28] On discovery, the plaintiff confirmed that she was surprised by the alleged assault, and had seen no behavior from Mr. Membreno-Navarrete which suggested he would be violent towards a person. Both applicants were questioned about their knowledge of any violent behavior on the part of Mr. Membreno-Navarrete, and both denied ever seeing Mr. Membreno-Navarrete be violent or aggressive towards anyone or any aggressive behavior on the part of Mr. Membreno-Navarrete. They stated they had never seen any behavior that suggested he would act in a violent way or a way that would threaten the safety of others in their home.
- [29] The plaintiff recounted one instance where Mr. Membreno-Navarrete was "angry and reactive" prior to the alleged assault. She recounted a time in the fall of 2015 when they were asked to vacate a hotel room due to a noise complaint. Mr. Membreno-Navarrete was angry and punched a glass case containing a fire extinguisher in the parkade, which caused an injury to his hand. On discovery, the plaintiff stated she sympathized with Mr. Membreno-Navarrete because he was frustrated when they got kicked out.

- [30] As has been stated by our courts many times, an application for summary trial is a trial, and the parties have to take every reasonable step to put themselves in the best position to prove their case: *Gichuru v. Pallai*, 2013 BCCA 60. I am satisfied that the plaintiff had ample time to obtain the police file and discover Mr. Membreno-Navarrete prior to this application. The fact that she has not completed these steps cannot be used as a reason to find the issues between the plaintiff and the applicants are not suitable for determination on this application. The plaintiff has an obligation to come to the summary trial with the evidence needed to determine her claims. She has provided an affidavit in support of her claim, and excerpts of her discoveries of the applicants. I am satisfied that to delay the summary trial would be a frustration of the process based on nothing but a hope by the plaintiff that something may turn up at trial with viva voce testimony.
- [31] Further, I am not satisfied that the plaintiff has established any credibility issues on the material facts in the claim against the applicants which require these issues to be determined at a full trial. For the reasons which I will set out below, the issues against the applicants can be determined even if I discount the applicants' evidence and accept the position of the plaintiff, namely that the applicants knew that their son drank alcohol, knew that he got intoxicated, knew that he had a driver's license suspension due to alcohol use, and knew that he punched a glass case and cut his hand in the fall of 2015.
- [32] I am satisfied that I have before me the evidence needed to resolve the issues against the applicants, and there will be a significant savings of time and cost in determining these issues summarily. I find the issues raised in the applicants' application are suitable for determination pursuant to R. 9-7.

Liability

- [33] This application turns on whether the plaintiff has proven the applicants had a duty of care towards her in the face of an objectively unreasonable foreseeable risk of harm arising from the conduct of Mr. Membreno-Navarrete in their home. For the purposes of this analysis, I will assume that Mr. Membreno-Navarrete did assault the plaintiff. However, I make no finding of fact in this respect, and the issue of whether Mr. Membreno-Navarrete did assault the plaintiff remains a live issue in the trial between the plaintiff and Mr. Membreno-Navarrete.
- [34] The plaintiff asserts claims in negligence and pursuant to the Occupiers Liability Act. Pursuant to s. 3(1) of the OLA, 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".
- [35] The BC Court of Appeal in *Agar v. Weber*, 2014 BCCA 297, leave to appeal to SCC ref'd, 36090 (20 October 2014) has confirmed that the standard of care under the OLA and at common law are the same:

- [30] The standard of care under the OLA and at common law for negligence is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.
- [36] The Alberta Court of Appeal in *McAllister v. Calgary (City)*, 2019 ABCA 214 has also provided guidance on the scope of liability under Alberta's Occupiers' Liability Act, R.S.A. 2000, c. O-4, which is substantively the same as BC's OLA, and which I adopt:
- [29] The overall purpose of the Occupiers' Liability Act was to rationalize the law by replacing the old categories of "licensees" and "invitees" with a new unified category of "visitors" to whom the occupier owed a "common" duty to take reasonable care. The statutory "common duty of care" set in s. 5 was intended to assimilate an occupier's duty with the modern "common law duty of care in tort": *Wood v Ward*, 2009 ABCA 325 at para. 6, 12 Alta LR (5th) 52, 464 AR 383; *Waldick v Malcolm* (1989), 70 OR (2d) 717 at p. 723 (CA) affm'd [1991] 2 SCR 456 at p. 475. The statute was not intended to increase the liability of occupiers to any higher level, nor was it intended to displace the presumptions underlying common law liability. The statute does not purport to make an occupier an insurer for every foreseeable harm suffered by a visitor, and does not require the occupier to completely eliminate all risks: *Waldick* at p. 723; *Milina v Bartsch* (1985), 49 BCLR (2d) 33 at p. 58 affm'd (1987), 49 BCLR (2d) 99 (CA).
- [Emphasis added.]
- [37] The first question on this application is whether Mr. Membreno-Navarrete represented an objectively unreasonable risk of harm to people in the home, with respect to which the applicants had a duty of care towards people in the position of the plaintiff. The next question is whether the applicants breached that duty of care.
- [38] The case of *Rendall v. Ewert*, 38 B.C.L.R. (2d) 1, 1989 CanLII 232 (C.A.) is instructive on the issue of the foreseeability of harm. The Court confirmed that a duty of care on the part of occupiers only arises with respect to harm that is reasonably foreseeable to them. The test is not whether the occupiers had actual knowledge of the potential for harm, but rather an objective test assessing whether the occupiers reasonably ought to have known of the risk of harm.
- [39] In *Rendall*, the adult son of the defendants committed a horrific assault on a teenage girl who was staying overnight with the defendants. The son did not live with his parents, but had a key to their home and was free to enter and leave as he saw fit. The son came into their home in the night and viciously assaulted the teenage girl.
- [40] The Court of Appeal then recounted the following factors relating to the son's history and behaviour:
- a) The relationship between the son and his mother was difficult, with him sometimes pushing, striking and physically demeaning his mother.
 - b) The son was a difficult and hostile member of the family.

- c) The son had no criminal record.
- d) In the family home, drugs and alcohol were tolerated "in a way and to a degree that is anything but admirable".
- e) The son had paid unwanted sexual attention to a friend of his sister around the same age as the girl he assaulted, but that was unknown to the parents.
- f) The son attacked and killed a young woman in a similar fashion about a month before the attack at issue, but this was unknown to his parents at the time of the assault.

[41] In the face of the son's conduct in Rendall, the Court of Appeal held at 13-14:

The Ewerts had no knowledge, and so far as appears no reasonable means of knowledge, of any propensity on the part of Jeffrey [the son] to unprovoked violence of the kind which took place.

I see nothing in the evidence from which it could reasonable be inferred that either of the parents should reasonably have foreseen that, if Jeffrey entered the house, he would be a hazard to the guest.

[42] In the case before me, the evidence of Mr. Membreno-Navarrete's behaviour prior to the alleged assault does not in any way approach the evidence regarding the son's history and behaviour in Rendall.

[43] The plaintiff relies on *Brown v. Keenan*, 2009 NBCA 81, *Oyagi v. Grossman*, [2007] O.J. No. 1087, 2007 CanLII 9234 (S.C.) and *Hamilton v. Kember*, [2008] O.J. No. 734, 2008 CanLII 6988 (S.C.). None of these cases detract from the statement of law I have set out above.

[44] In *Brown*, the Court confirmed that a positive duty of care may exist if foreseeability of harm is present, and if a special link of proximity is created. Both *Oyagi* and *Hamilton* are social host liability cases where the parents were negligent in allowing a situation to arise where their teenage children hosted parties where alcohol was served and a person was injured as a result. These facts are entirely different from the facts before me, but the underlying legal proposition remains the same--did the parents allow for an objectively unreasonable risk of harm to arise on their premises such that a duty of care to the partygoers arose.

[45] In the case at bar, the parents have been examined for discovery, and their evidence is that they had no knowledge of their son's misuse of alcohol, driving suspension, or any violent behavior on his part.

[46] The plaintiff submits that Mr. Membreno-Navarrete misused drugs and alcohol, had two driving suspensions for driving while intoxicated, and on one occasion punched a glass case when he was angry, injuring his hand. The plaintiff also confirmed on discovery that before the alleged assault, she had no concern that Mr. Membreno-Navarrete might assault her, and he did not have a violent personality towards people.

- [47] The plaintiff's evidence is that the alleged assault happened in the middle of the night, around midnight. The plaintiff and Mr. Membreno-Navarrete were arguing, but they were not loud and did not wake up the parents. The night of the alleged assault was the first time there had been any physical altercation between the plaintiff and Mr. Membreno-Navarrete, and he had never threatened her before that night. Before the night of the alleged assault, the only physical altercation the plaintiff knew Mr. Membreno-Navarrete had been involved in was a time where Mr. Membreno-Navarrete himself was physically assaulted (it is not clear from the transcript whether the plaintiff witnessed this assault or was simply told about it). The plaintiff never had discussions with the applicants about Mr. Membreno-Navarrete having anger issues or violent tendencies.
- [48] Even if all of the information known to the plaintiff ought to have been known to the applicants, I do not accept that such information gives rise to an objectively reasonable foreseeability of risk that Mr. Membreno-Navarrete might assault a person while staying in the applicants' home. The fact that Mr. Membreno-Navarrete had a history of misusing alcohol, or using drugs, does not objectively give rise to a foreseeable risk that he will assault a person. The fact that he punched a glass case in anger also does not objectively give rise to a foreseeable risk that he will assault a person. The fact that he was, possibly, assaulted by another person does not give rise to an objectively foreseeable risk of harm. There is nothing in the history of Mr. Membreno-Navarrete's behaviour as known to his parents, or as advanced by the plaintiff in support of her case on this summary trial application, which would support an inference of a reasonably foreseeable risk of harm to the plaintiff.
- [49] Because I find that Mr. Membreno-Navarrete's alleged assault was not objectively reasonably foreseeable to the applicants, I find that the applicants had no duty to protect the plaintiff from Mr. Membreno-Navarrete's actions in the circumstances of this case.
- [50] The application of the applicants is allowed. The issue of liability of the defendants Nelly Membreno and Fila Membreno is severed from the general issues of liability and damages in this case, and the plaintiff's claims against Nelly Membreno and Fila Membreno are dismissed.
- [51] The parties have leave to make submissions on costs. If no submissions are received within 45 days of this decision, I order ordinary costs against the in favour of the defendants Nelly Membreno and Fila Membreno.

"W.A. Baker J."

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