COURT OF APPEAL FOR ONTARIO

CITATION: Moran v. Fabrizi, 2023 ONCA 21
DATE: 20230116
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Lauwers, Paciocco and Zarnett JJ.A.

BETWEEN

Tate Moran

Plaintiff

and

Ottavio Fabrizi, Elaine Ingleson, and Roberta Beriault

Defendants (Respondent)

and

Dennis G. K. Chu and John Doe

Third Parties (Appellant)

Frank A. Benedetto and J.C. Rioux, for the appellant

David Zarek and Meredith A. Harper, for the respondent

Heard: November 22, 2022

On appeal from the judgment of Justice James F. Diamond of the Ontario Superior Court of Justice, dated April 12, 2021, with reasons reported at 2021 ONSC 2600.

Lauwers J.A.:

[1] Tate Moran was injured in a motor vehicle accident. She was a passenger in a minivan driven by her grandmother, Elaine Ingleson. Ottavio Fabrizi ran a red light and his Buick collided with the minivan. Moran's action was settled for

$220,000. Fabrizi sued Dennis G. K. Chu in the third party action seeking contribution and indemnity for the settlement under s. 5 of the *Negligence Act*, R.S.O. 1990 c. N. 1.

[2] The trial judge found in favour of Fabrizi. The trial judge found that Chu's "threats of physical violence amount to intentional tortious conduct" and that "the accident would not have occurred but for Chu's conduct." The trial judge ultimately found Chu to be 50 percent responsible for causing Moran's injuries and required him to indemnify Fabrizi for $110,000. Chu appeals.

The procedural context

[3] In the main action, Moran sued three individuals: Fabrizi, as the owner and driver of the car that struck the minivan in which she was a passenger, Ingleson, who was the driver of the minivan, and Roberta Beriault, who is Moran's mother and the minivan's owner. Moran did not sue Chu.

[4] Fabrizi made a third party claim against Chu, which Chu defended on a boilerplate basis denying liability under the *Negligence Act*. As a third party, Chu did not seek to defend the main action as he was entitled to do under r. 29.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[5] The real fight in the third party action is between Fabrizi's insurer, who settled with Moran, and Chu's insurer, over what proportion each policy would be

required to contribute to the payment of the settlement. This underlying financial reality does not affect the legal principles at play in deciding the case.

Issue on appeal

[6] Chu argues that the trial judge erred in his understanding and application of the test for causation that applies in determining whether Chu "caused or contributed to" the accident in which Moran was injured, within the meaning of ss. 1 and 5 of the *Negligence Act*.

Analysis

[7] Sections 1 and 5 of the *Negligence Act* are in issue. They provide:

> **1.** Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence…
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> …
>
> **5.** Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.

[8] Chu argues that "Fabrizi had to prove that 'but for' Chu's breach of the standard of care that the injury of Tate Moran would not have occurred." Chu

asserts: “In short, there must be both negligence and causation established against two or more persons for there to be apportionment between them and a right of contribution and indemnity by one against the other.”

[9] As to the asserted requirement for negligence on the part of both tortfeasors, I discern a lurking ambiguity in Chu’s way of framing the test that must be clarified. To trigger third party indemnity under s. 5 of the *Negligence Act* there need not be negligence on the part of both parties. One party’s tort can be negligence and the other party’s tort intentional. The fact that Chu’s tort was intentional while Fabrizi’s tort was negligence has no bearing on whether Chu must share Fabrizi’s liability under s. 5 of the *Negligence Act*: see *Bell Canada v. Cope (Sarnia) Ltd.*, (1980), 31 O.R. (2d) 571 (C.A.), 119 D.L.R. (3d) 254, at paras. 2-4; *Pet Valu Inc. v. Thomas*, 2004 CarswellOnt 370 (S.C.), at para. 24; *J.K. v. Ontario*, 2017 ONCA 902, 22 C.P.C. (8th) 306, at para. 31. See more generally the *Report on Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ontario Law Reform Commission, 1988), at pp. 60-65, which led to the 1990 amendments of the *Negligence Act*.

[10] It is necessary for Fabrizi to prove that Chu’s tortious conduct was causally linked to Moran’s injuries. Chu makes four overlapping arguments on the causation issue: 1) the trial judge “misdirected himself on the law concerning causation”; 2) he misapplied the test; 3) he failed to consider whether Fabrizi’s negligence was an intervening act making Fabrizi solely liable; 4) the trial judge failed to appreciate

how the doctrine of the “agony of the moment” should be applied. I address each argument in turn. I begin by setting out the trial judge’s factual findings and then his self-instruction on the law of causation.

The trial judge’s factual findings

[11] The trial judge laid out the evidence in detail. I need only set out several of his factual findings, which neither side contests on appeal. The trial judge found Danielle Scire, who was Fabrizi’s passenger, to be both credible and reliable. Fabrizi passed Chu, who was driving very slowly on a residential street. This enraged Chu, who caught up with Fabrizi and tried to stop him in order to accost him. The trial judge found that “Fabrizi and Scire were the victims of Chu’s road rage.” He noted:

> Scire says that she and Fabrizi locked the doors and windows. Chu took off his sweater and was wearing a "wife beater" tank top. He was swearing, yelling, and punching and hitting the Buick.
>
> There is ample evidence in the record before the Court to find that Chu verbally assaulted Fabrizi and threatened him with violence. Scire gave evidence that she was "freaking out" as she was a young, 18 year old girl being screamed at and threatened by what she described to be a muscular, agitated man. Scire testified that she was pleading with Fabrizi to leave the scene as soon as possible. No doubt this contributed to Fabrizi's state of mind as he drove away from the scene and struck the minivan.

[12] Chu does not argue that these factual findings are wrong. This court must defer to them in the absence of a palpable and overriding error or some error in principle, which Chu does not assert.

The trial judge's self-instruction on causation was correct

[13] The trial judge set out the familiar law of causation from *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, and other authorities. In *Clements*, McLachlin C.J. stated, at para. 8:

> The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails. [Italicized emphasis in original; underlined emphasis added

[14] Chu does not dispute the trial judge's articulation of the "but for" test for causation as the applicable test in determining whether the third party's actions "caused or contributed to" Moran's damages.

The trial judge's application of the causation test was correct

[15] Chu's real challenge is to the trial judge's application of the causation test. The trial judge purported to apply the standard "but for" test and concluded:

> In my view, on the balance of probabilities the accident would not have occurred but for Chu's conduct. Had Chu not pulled up next to the Buick, exited his vehicle, and verbally threatened Fabrizi, I find that Fabrizi would have had a clear path to either proceed on Perivale Road, or turn right onto Rathburn Road.
>
> Whether or not Fabrizi's car was pinned against the curb lane, he none the less felt an increased, necessary urge to leave the scene as soon as possible and escape the threatening atmosphere caused by Chu, whose conduct was necessary to ultimately bring about the plaintiff's injuries. [Emphasis added.]

[16] The trial judge's language of application tracks closely Chu's assertion in his factum that: "Inherent in the phrase 'but for' is a requirement that Chu's negligence was necessary to bring about the injury." That language plainly tracks the quoted and underlined language from *Clements* quoted above in para. 13. Chu adds: "it must have been shown by Fabrizi that the injury would not have occurred without Chu's conduct." The trial judge applied the right test to the facts as found.

[17] However, Chu seeks to undermine the correctness of the trial judge's application of the causation test on the basis that, after setting out the test and making the associated factual findings, the trial judge said: "In any event, even if the 'but for' test was unworkable on the facts before the Court, I would have found that Chu was liable based upon the 'material contribution' test." Chu asserts that the trial judge's invocation of the "material contribution" test "demonstrated a discomfort with his finding of 50 percent liability against Chu on the basis of the 'but for' test." I disagree. I see no basis in the trial judge's sparse comment for

doubting the conviction in his determinative finding on the "but for" test. The "but for" test was not unworkable on the facts. The trial judge was simply adding the superfluous observation that, had he been unable to make a factual causation finding by applying the "but for" test, Chu would still not have escaped liability because the "material contribution" test would have applied and would have been satisfied. That said, in my view there was no basis for and no need to apply the "material contribution" test. This is not a case where "special circumstances" posed by "difficulties of proof that multi-tortfeasor cases may pose" require the "robust and common sense application of the 'but for' test of causation" to be replaced by the "material contribution" test: *Clements*, at paras. 27-28.

The intervening act argument does not assist Chu

[18] Chu argues that Fabrizi's own actions in responding to Chu's aggression constituted an intervening act that broke the causal link between Chu's actions and Moran's injuries:

> The Trial Judge was highly critical of the conduct of Chu given that he pulled up beside the Fabrizi vehicle and stood beside it for the purpose of berating Fabrizi and threatening him with violence, but a later intervening act occurred, that being the conscious act of Fabrizi's own volition to proceed forward into the intersection and crash into the Ingleson vehicle causing the injury to Tate Moran. This occurred in the context of the threats by Chu not being so imminent as to excuse Fabrizi from acting reasonably in accordance with the standard of care of a reasonable motorist.

> Where, as here, Chu's verbal threats were not found to have put Fabrizi in imminent danger so as to create a situation in which Fabrizi no longer had the ability to act of his own volition, the evidence and the findings of fact based on the evidence clearly establish an intervening act being the conduct of Fabrizi that was the one and only contributing cause of the injury sustained by Tate Moran. Viewed in this context as a matter of law, causation was not properly established on a balance of probabilities against Chu given that Chu's conduct in the overall context of the series of transactions that preceded the injury was an ancillary aspect of the ultimately negligent decision of Fabrizi that was the one and only effective cause of Tate Moran's injuries. [Emphasis added.]

[19] Chu concludes that "[w]here, as here, the reasons read in their entirety reflect a finding of ultimate causation in relation only to Fabrizi, this Court should intervene, allow the appeal, and reverse the decision of the Trial Judge."

[20] With respect, that is not a fair reading of the trial judge's causation analysis. Minimizing Chu's role as merely "an ancillary aspect of the ultimately negligent decision of Fabrizi" does not assist Chu. This is because Chu's necessary, even if "ancillary", role means that Fabrizi's "ultimately negligent decision" was not "the one and only effective cause of Tate Moran's injuries", on the trial judge's findings.

[21] To buttress the argument in oral submissions, Chu's counsel asserted that since Fabrizi did not succeed in making out the "agony of the moment" defence at trial, Chu's behaviour could not in law be a cause of the accident that injured Moran, or is too remote. I disagree.

The agony of the moment doctrine does not assist Chu

[22] The doctrine of "agony of the moment" can provide a defence that goes to the standard of care element of negligence. The defendant can use it as a shield against responsibility for conduct in a situation of emergency or panic. The doctrine is referred to as "agony of the moment", or "agony of collision", or "emergency", and it can be used to excuse a defendant's conduct that might otherwise be considered negligent: Erika Chamberlain & Stephen Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Carswell, 2022), at p. 589. The doctrine was considered in this Court's decision in *Isaac Estate v. Matuszynska*, 2018 ONCA 177, 23 M.V.R. (7th) 173, particularly at paras. 27-28, although there it is referred to as the "doctrine of emergency". The motion judge in *Isaac Estate* referred to the "agony of the moment" doctrine at para. 102 of her decision, citing from Fleming in the *Law of Torts*, 6th ed. (Sydney: Law Book Co., 1983).

[23] At trial, Fabrizi's counsel raised the doctrine of "agony of the moment" or emergency perhaps in order to attenuate the standard of care otherwise applicable to Fabrizi, or perhaps in order to influence the apportionment calculus more heavily against Chu. The doctrine was apparently not raised by Chu, who nonetheless now seeks to enlist it in his favour.

[24] In the context of this case, only Fabrizi could have used the doctrine of agony of the moment or emergency as a defence, but he did not plead it. Chu could not

raise this defence against liability for the obvious reason that he created whatever emergency there was. Similarly, Chu cannot rely on the trial judge's implicit rejection of Fabrizi's "agony of the moment" defence to argue that the causal chain between Chu's intentional tortious behaviour and Moran's injuries is broken or too remote. The "agony of the moment" defence only goes to the standard of care element of negligence (in this case, Fabrizi's standard of care as a reasonable motorist). The doctrine does not have any bearing on the causation analysis.

[25] The trial judge inferentially rejected the application of the doctrine of "agony of the moment". I quote again para. 60, where the trial judge captures the sense of urgency: "Whether or not Fabrizi's car was pinned against the curb lane, he none the less felt an increased, necessary urge to leave the scene as soon as possible and escape the threatening atmosphere caused by Chu, whose conduct was necessary to ultimately bring about the plaintiff's injuries." However, the trial judge added, at para. 62:

> This leaves the apportionment of liability. While I have found that Fabrizi likely feared or apprehended imminent contact of a harmful or present nature on the part of Chu, those threats were not so imminent as to absolve Fabrizi from the responsibility to proceed in a reasonable and prudent fashion especially given that, by everyone's account, the stop light was red. Fabrizi was still under an obligation to enter Rathburn Road safely, and based upon the photographs of the accident it appears that he accelerated towards Rathburn Road at a relatively high rate of speed, which caused the damage to the minivan and the plaintiff.

These words inferentially reject the application of the “agony of the moment” doctrine.

[26] In short, it is not open to Chu to capitalize on the doctrine of “agony of the moment” to escape liability. Further, Fabrizi continued to owe a duty of care towards Moran and failed to meet the applicable standard of care. But that does not absolve Chu nor does Fabrizi’s breach of the duty of care constitute an intervening cause.

[27] To summarize, the third party claim, as the trial judge explained, “seeks contribution and indemnity from Chu on the basis that the accident was caused entirely, or in part, by Chu's negligence, breach of duty, or perhaps some other tortious conduct.” The trial judge agreed with Fabrizi’s submission “that threats of physical violence amount to intentional tortious conduct.” The issue in the case was whether Chu’s tortious conduct “caused or contributed to” Moran’s injury, within the meaning of s. 1 of the *Negligence Act*. The trial judge correctly determined that issue on the facts and the law.

[28] The appellant frames his grounds of appeal as alleging errors of law, but in substance, the appellant’s submissions allege errors of fact. The appellant’s core argument is that because the trial judge found that the appellant’s threats were not so imminent as to excuse the respondent from acting reasonably, the appellant’s conduct was ancillary to the ultimate cause of the plaintiff’s injuries. However, the

trial judge made a finding that the appellant's conduct was a "but for" cause of the plaintiff's injuries. The appellant has failed to identify any reviewable errors with this finding, and the finding is not unreasonable given the evidence on the record.

Disposition

[29] The appeal is dismissed with costs payable by the appellant to the respondent in the agreed amount of $7,500 all-inclusive.

Released: January 16, 2023 "P.D.L."

"P. Lauwers J.A."
"I agree. David M. Paciocco J.A."
"I agree. B. Zarnett J.A."