1983 CarswellNB 274
New Brunswick Court of Queen's Bench (Trial Division)

Thibodeau v. New Brunswick Housing Corp.

1983 CarswellNB 274, [1983] N.B.J. No. 369, 137 A.P.R. 6, 23 A.C.W.S. (2d) 201, 52 N.B.R. (2d) 6

Joanne Thibodeau, by her litigation guardian, Arthur Thibodeau, Plaintiff and New Brunswick Housing Corporation, a Crown Corporation, duly incorporated pursuant to the laws of the Province of New Brunswick, Defendant

Kelly, J.

Heard: August 25-29, 1983
Judgment: November 25, 1983
Docket: N/C/293/82

Counsel: *Frank McKenna, Esq.*, for the Plaintiff
Pierre Tremblay, Esq., for the Defendant

Subject: Property

Headnote

Landlord and Tenant --- Residential tenancies — Repairs and fitness — Landlord's obligation
Child knocked down by family's apartment door blowing open — Child's leg fractured — Door installed incorrectly by landlord during lease and not fixed despite family's complaints -- Landlord bound by covenant to maintain unit in good repair -- Landlord found liable — Affixing door cylinder to cracked frame and failing to attach safety chain in usual manner amounting to negligence.

***Kelly, J.*:**

1 On September 30, 1981 Joanne Thibodeau, then 14 years old, was struck by the aluminum outside door of the family's apartment which blew open as she touched the handle to enter. She was knocked to the ground and suffered a fracture of the leg. The door's cylinder had pulled away from the casing to which it was attached and the spring and safety chain had pulled out of the door itself.

2 The owner of the building and the landlord was New Brunswick Housing Corporation. The tenant was Arthur Thibodeau, the father and litigation guardian of the infant Plaintiff. The premises formed part of a duplex. There was only one door to this apartment which was located on the side of the building adjacent to a paved driveway. A flat concrete platform approximately four and one half inches thick was located below the door between the foundation and the paved driveway. It was almost seven feet long and three feet wide and one stepped up from it approximately nine inches to enter the doorway.

3 On one side of this entrance to the apartment was a long narrow glass window. Both the inside and outside doors were hung on the side opposite this window into the main body of the building. This was in accordance with the practice of the trade.

4 Sometime during the lease a wooden storm door was removed and replaced with the aluminum door. This door was of standard size with combination screen and glass panels and weighed about 30 lbs. A cylinder was affixed at the bottom to the door frame. A safety chain was likewise affixed but rather than being attached near the centre of the door casing as was the preferred and usual position, it had been affixed more to the side near the hinges. In this position, it is admitted, it was less effective. According to the Thibodeaus at the time of the installation of this door, the door frame was cracked and the cylinder had hauled out from the frame. It did not come out completely as the safety chain held the door.

5 The Thibodeaus had called the office of the landlord at least ten times complaining about the condition of this door. When it was windy, their children had to be assisted with this door because it opened with such force. It was the father's contention that the door opened with the wind rather than against it as it presently does. The landlord had no record of the Thibodeaus calls because the "unit system" which now catalogues the requests of each apartment unit was not then in effect. The evidence disclosed that daily between 20 to 30 calls are received from tenants at the office of the Defendant. These are looked after on a priority basis by the Technical Service Manager who has four employees working under him. These men are responsible for the maintenance of 800 units extending from Belledune to Lamèque in Gloucester County. As these calls had all gone unanswere Mr. Thibodeau in an attempt to secure the cylinder had used four inche spikes also without success.

6 In the lease dated November 23, 1978, Mr. Arthur Thibodeau appears as tenant and the Defendant as landlord. This lease provided for a monthly tenancy commencing January 1, 1979. A covenant in the lease provided that the lessor would maintain the unit in a good state of repair.

7 If the landlord were negligent, is he liable for the injuries suffered by a member of the tenant's family, is the issue to be determined.

8 In general it can be said that, contract apart, at common law a landlord of unfurnished premises owed no duty to the tenant, his family, and others entering the demised premises who were injured thereon because of the dangerous condition of these premises. Even where there existed an obligation on the part of the landlord to keep the premises in repair, this did not confer upon strangers to the contract including members of the tenant's family any additional rights (*Cavalier v. Pope*, (1906) A.C. 428).

9 These principles of exemption from liability however applied to the dangerous conditions of the premises before the tenant took possession. Such was not necessarily the case where the negligence complained of occurred after the commencement of the tenancy. As was said by Tucker, L.J. in *Ball v. The London County Council*, (1949) 2 K.B. 159 at 162 there is "no authority for the proposition that the immunity which attaches to a landlord in respect of the condition of the premises before a lease continues as some sort of magic protection to him at all times subsequent to the lease."

10 The general proposition is stated in Salmond, Law of Torts, 17th ed. (1977), at p. 296:

> It should be observed that the foregoing rules as to the exemption of a landlord from liability for the dangerous condition of the demised premises related solely to his acts of omission or nonfeasance. He was not bound to make the premises safe or to ascertain whether they were dangerous in the absence of an express covenant to do so, yet if by a positive act of negligent misfeasance after the commencement of the lease he actually created a source of danger he was responsible for any accident which was the direct result of his negligence.

11 In this case the cylinder of the door was already affixed to a frame which was cracked when the Thibodeaus had first entered the premises. After neglecting the repeated requests of Mrs. Thibodeau, not surprisingly the door on this particular windy day finally tore loose and struck the infant Plaintiff. I find that the affixing of the cylinder to a frame already cracked and the failure as well to attach the chain in the designated and usual position near the centre of the door frame amounted to negligence. It was this negligence which was the cause of the cylinder hauling away from the door frame and the chain pulling out of the aluminum door resulting in the injury to the infant Plaintiff.

Damages:

Special Damages:

12 The following special damages are agreed upon:

Medicare New Brunswick	$ 9,547.08
Travelling expenses	430.00
Medical reports	100.00

TOTAL $10,077.08

General Damages:

13 As a result of the accident, the infant Plaintiff, 14 years old, suffered a fracture of the distal one-third of her right femur. This was treated initially by skin traction and later skeletal traction to control the fracture position. Following this, the leg was immobilized in a cast from the toes to the groin area. She was discharged almost two months after her initial admission. The leg cast was removed approximately five weeks later and physiotherapy commenced. Because of the lact of progress, it was necessary that she be readmitted for a period of 18 days in February, 1982. Under a general anesthetic, a manipulation of the right knee was done and physiotherapy continued. Returning home she walked with the aid of a cane and continued her exercises for two to three weeks. She could not return to school that year and today complains of not being able to run as fast as before or roller skate as much. However it was the Doctor's opinion, that there would be no functional disability. Arising out of this injury the pain and suffering undergone, I would allow general damages in the amount of $8,000.00.

14 There will be therefore judgment in favour of the infant Plaintiff for special damages in the amount of $10,077.08 together with interest at the rate of six percent per annum from the date of the accident to the date of judgment; and for general damages in the amount of $8,000.00 together with interest at the rate of twelve percent per annum from the date of the institution of the action to the date of judgment.

15 For the purpose of fixing costs the amount involved is $20,000.00 and I fix costs at $2,625.00, Scale 3, to be paid by the Defendant to the Plaintiff.

16 With respect to the judgment for general damages, I direct that pursuant to Rule 7.07 of the Rules of Court, the money payable under the said judgment be paid into Court, *or* if the litigation guardian wishes, I will entertain a motion for payment of the said sum (less appropriate fees and disbursements) into an interest bearing account at a bank or trust company to be approved by the Court, until the infant Plaintiff reaches the age of majority.

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