1989 CarswellNB 223
New Brunswick Court of Queen's Bench Trial Division

Turnbull v. Hsieh

1989 CarswellNB 223, [1989] A.N.B. No. 933, [1989] N.B.J. No. 933, 101 N.B.R. (2d) 339, 19 A.C.W.S. (3d) 462, 254 A.P.R. 339

Melissa Turnbull, by her litigation guardian, Trudy Turnbull, Plaintiffs v. Ejin Hsieh, Defendant; Trudy Turnbull, Third Party

Russell J.

Judgment: October 12, 1989
Docket: Doc. F/C/14/89

Counsel: *Douglas L. Smith, Esq.*, for the Plaintiffs.
John P. Barry, Q.C., Esq., for the Defendant.

Subject: Civil Practice and Procedure; Torts; Property

Headnote

Damages --- Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Expenditures
Damages --- Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Collateral benefits — Voluntary assistance by third party
Landlord and Tenant --- Residential tenancies — Repairs and fitness — Landlord's obligation — Statutory duty to repair
Landlord liable for injury due to lack of repair — Residential Tenancies Act, S.N.B. 1975, c. R-10.2, s. 3.
Tenant informed landlord several times that the bath tap was loose and the water too hot. Landlord made a cursory inspection and did not repair the tap. Subsequently, tenant's infant daughter was badly scalded when the tap came away from the wall. Tenant claimed damages from landlord. Held, the claim was allowed. Landlord breached his statutory duty under the Act to maintain the premises in a good state of repair. Proof of a statutory breach might be evidence of negligence in a civil action. Landlord failed to use the proper equipment and procedures to inspect the tap and so was negligent.

***Russell J.*:**

1 The infant plaintiff was scalded while her mother, Trudy Turnbull was bathing her in the bathtub of the house rented by Ms. Turnbull from the defendant. The plaintiff says the hot water tap dislodged from the wall causing the injury and that the defendant violated certain provisions of the Residential Tenancies Act, 1975 Statutes of New Brunswick Chapter R10:2; and was negligent in failing to effect repairs. For her part the landlord denies she was negligent and says that Trudy Turnbull failed to advise her of the defective faucet. In the alternative the defendant pleads latent defect.

2 At trial the action against Trudy Turnbull as a Third Party was discontinued.

3 Trudy Turnbull and Susan Thornton rented the premises, a self-contained house, on June 1st, 1987. It is their evidence that sometime during the period between June 1st, 1987 and July 1st, 1987, the day of the accident, they made several phone calls to Gideon Mersereau the landlord's representative who in fact is the defendant's son-in-law. These calls according to Susan Thornton were to complain about the hot water being too hot and that the hot water tap in the bathtub was leaking and loose. According to Susan Thornton Mr. Mersereau did not check the leak or take any actions to correct it prior to the accident occurring.

4 Trudy Turnbull essentially confirmed Ms. Thornton's evidence and said Mr. Mersereau was called perhaps seven or eight times although she did not speak to him personally before the accident because when she telephoned she either received a

message from an answering machine or there was no answer. According to Ms. Turnbull Mr. Mersereau did not inspect the taps before the accident.

5 It is undisputed the accident occurred on July 1st, 1987 while three of the Turnbull children were being bathed. Two younger children were at or near the front of the bathtub while Melissa was near the rear of the tub and at some point during the bath the tap fell from its location with the chrome tap and a decorative chrome fitting which normally is flush against the tile falling to the bottom of the tub leaving nothing but a hole in the wall, and at that point hot water was spraying back toward the rear of the bathtub hitting the tiled wall at the back of the the tub. The hot water which was travelling horizontally went over the top of the two younger children's heads and hit Melissa who immediately stood up causing her to be scalded to an even greater degree. Upon removing the children from the bathtub Ms. Turnbull ran downstairs and shut off the hot water at the hot water tank. According to Ms. Turnbull some two to three days later Mr. Mersereau replaced a rubber or washer on the tap but a couple of weeks later the tap started leaking again. She further confirmed that the "knob" on the tap was loose before the accident but that she did not give that much consideration.

6 Shortly after the accident Martin Beek, Ms. Turnbull's step-brother set the tap back in place then turned the water on so he could take a shower at the downstairs bathtub.

7 Between the time of the accident occurring and the time Mr. Beek took the actions above described one Donnel O'Brien a neighbour viewed the scene. He had been sitting on his sun deck and heard children screaming so he attended at the premises and saw Melissa who appeared to be in considerable discomfort with skin hanging from her. He went into the bathroom where he observed a hole in the wall where the tap had been. When shown the photograph Exhibit 3D he indicated that this showed a scene similar to what he saw immediately after the accident occurred.

8 John Gideon Mersereau testified on behalf of the defendant. He and his wife (the defendant's daughter) in fact owned and lived in the home from approximately 1975 to 1984. Mr. Mersereau and his wife are in the residential rental business and since moving from the home in 1984 the property has been continuously rented. The conveyance to his mother-in-law was, for want of a better phrase, a conveyance of convenience and he has continued to administer and maintain the property. He received two messages during the month of June with respect to the leaking tap and as a result of Ms. Turnbull's call attended at the premises and looked at the tap. He did not see any dripping and he turned the hot water tap on and off. This was the extent of Mr. Mersereau's inspection. He does not have a recollection of a complaint about the water temperature nor about the faucet being loose. Subsequent to the accident he replaced the washer in the hot water tap by removing the chrome tap and not by removing the complete tap set from the copper tubing.

9 I generally accept the evidence of Ms. Thornton and Ms. Turnbull relating to their concerns about the tap's condition before the accident, the calls they made and their evidence concerning the incident itself. The evidence of the accident and the condition and location of the water tap immediately after the accident is confirmed by Mr. O'Brien's evidence.

10 A brief explanation of the tap itself (Exhibit P5) is necessary. The unit consists of a cold water tap; a hot water tap and a mixing valve between the two which directed the water either to a faucet or to a shower head. The copper tubing carrying the hot water terminates at a female threaded fitting as shown in photograph Exhibit 3D. The threaded fitting is located flush with the tile at the head of the bathtub. The tap, consisting of a chrome handle and a decorative chrome cover piece is screwed on to the above mentioned threaded fitting by means of a nut. When the handle is turned a threaded spindle with a washer on the end either moves in or out of the tap body thus permitting hot water which is always present in the system immediately behind the washer to flow. When the tap handle is opened fully and even if more counter clockwise pressure is applied to it the brass nut holding the unit to the hot water system should not open or move.

11 Having accepted the evidence of Mr. O'Brien and Ms. Turnbull that the complete chrome apparatus fell from the wall I conclude that the brass nut holding the complete faucet assembly to the plumbing system was loose and turned each time the tap was opened and shut. I conclude this nut was partially unthreaded at the time the children began to take their baths on July 1st, 1987, and at some point during the bath the brass nut completely unthreaded causing the tap assembly to drop in to the bath tub thereby releasing a stream of hot water. Had the nut been properly tightened with the proper equipment it would undoubtedly

prove impossible to completely unthread the nut from the brass fitting with the leverage obtainable at the tap handle by an ordinary person. This is evident when the hot water assembly is compared with the adjacent cold water assembly in Exhibit P5. It is impossible to unthread the nut on the cold water tap while the nut on the hot water tap moves quite easily.

12 I conclude that had Gideon Mersereau utilized the proper equipment and procedures when he examined the tap some time during the month of June the nut holding the hot water tap assembly to the plumbing system would have been tightened to the point that a person using the hot water tap would not be able to dislodge it from the water system. By conducting only a cursory inspection of the tap he was negligent and that negligence led directly to the injuries suffered by the infant plaintiff.

13 At common-law a landlord was not responsible for injuries suffered by his tenant.

14 New Brunswick now has the Residential Tenancies Act, Chapter R-10.2 Statutes of New Brunswick 1975 Sections 3(1) and 3(2) of which says:

> 3(1) A Landlord
>
> (a) shall deliver the premises to the tenant in a good state of repair and fit for habitation;
>
> (b) shall maintain the premises in a good state of repair and fit for habitation;
>
> (b.1) shall deliver to the tenant and maintain in a good state of repair any chattels provided therein by the landlord;
>
> (c) shall comply with all health, safety, housing and building standards and any other legal requirement respecting the premises; and
>
> (d) shall keep all common areas in a clean and safe condition.
>
> 3(2) Subsection (1) applies whether any state of non-repair or unfitness for habitation existed to the knowledge of the tenant before the tenancy agreement was entered into or arose thereafter.

15 The plaintiff has pleaded this section and in particular Section 3(1)(b).

16 In argument the plaintiff's counsel indicated that there was also a breach of Section 3(2) (supra) and accordingly liability automatically settles on the landlord.

17 This problem has been canvassed in *Fleischmann et al v. Grossman Holdings Ltd. et al, 16 Ontario Reports (2d) 748, McQuestion et al v. Schneider et al 1975 8 Ontario Reports (2d) 249*, and *Cunningham v. Moore 1973 1 O.R. 357-359*. The Fleischmann case involved damages caused by a frozen water pipe and the evidence revealed that the pipe froze because of the landlord's failure to repair a broken window. Section 96 of the Ontario Landlord and Tenant Act R.S.O. 1970 Chapter 236 contained the following clause:

> 96(1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

18 The Ontario Section therefore is analagous to our Section 3 of the Residential Tenancies Act. Mr. Justice Dubin stated in part as follows:

> In my view, s. 96(1) does not impose an absolute liability upon a landlord for any injuries or damages that may be caused by a latent defect, of which the landlord has no knowledge, nor could reasonably be expected to have had such knowledge. To alter the law so drastically as to impose strict liability on a landlord, regardless of his knowledge or constructive knowledge, would require much more precise language. -----

I am satisfied, as was Holland, J., that s. 96 creates a statutory duty of repair; that it provides therein a standard of care that must be observed by the landlord; that the breach thereof can be asserted in an action; and that the tenant is not confined to invoking the procedure outlined in s.96(3).----

Although s. 96(1) creates a liability that is at least broader than had existed at common law, and also provides a remedy for enforcing it, I do not regard that remedy as exclusive.

Section 96 (3) merely provides a summary remedy available to a tenant, more appropriate in many cases than the institution of an action, but does not remove the right of the tenant to seek relief by an action. This very issue was thoroughly canvassed by His Honour Judge Scott in *Cunningham* et al. v. *Moore*, [1972] 3 O.R. 369 at p. 373 and ff., 28 D.L.R. (3d) 277 at p. 281 and ff., and I agree with the conclusion that he arrived at.

19 Subsequently in the case of *Dawson v. Union Carbide Ltd., 1989, O.J. No.462 action No.8616/86A* March 31st, 1989, Mr. Justice Hollingworth discussed the Fleischmann (supra) judgments and referred to the Saskatchewan Wheat Pool case *1983 1 S.C.R. 205*. He said:

Mr. Freiman countered with the Saskatchewan Wheat Pool case, found at [1983] 1 S.C.R. 205, with particular reference to the conclusions of the Chief Justice of Canada at p. 227. It will be seen from both *Cunningham* and Fleischmann the Court held that if there were a breach of statutory duty and damage resulted, that an action would lie. Chief Justice Dickson, in the Saskatchewan Wheat Pool case said, in his conclusion, clause 2:

2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence per se giving rise to absolute liability.

3. Proof of statutory breach, causative of damages, may be evidence of negligence.

20 In referring to the Saskatchewan case Mr. Justice Hollingworth further said:

In the third place, I would submit that the Saskatchewan Wheat Pool case overrules the two Ontario cases. There now has to have been more than a breach and subsequent damages. Fault must be shown and, indeed, as MacKinnon J.A. said in McQuestion, but as Dickson C.J.C. has made abundantly clear in the Saskatchewan Wheat Pool case, there is absolutely no fault that can be attributed to the landlord in this case.

21 I conclude here however that there was a breach of the landlord's duty to maintain the premises as required by section 3 of the Residential Tenancies Act and further this breach arose because of the negligence of the landlord in failing to properly inspect and repair the tap which led directly to injuries suffered by the infant plaintiff.

22 In my view the plaintiff has established a breach of section 3 of the Residential Tenancies Act 1975 constituting negligence.

23 As the result of the scalding received in the incident the infant was hospitalized at the Dr. Everett Chalmers Hospital for approximately three weeks during which time she was under the care of Dr. William A. Cook, a physician specializing in plastic surgery, whose report became part of Exhibit P-1.

24 His report states in part:

Examination at that time revealed a small five year old girl weighing only about thirty-seven pounds and crying in distress with her burn wounds. There was extensive scalding involving most of the posterior surface of her body, all of which looked bright pink and flushed. There were some areas of second degree burn injury where the skin had peeled off on the right upper arm, the right lower back, the left posterior thigh, the right knee, and the right shoulder areas. The rest of the area had not yet blistered or peeled but extended from the level of the neck to the heels. Total body surface area involved was in the neighborhood of about 44%. 10% of this appeared to be second degree burn, the remainder being 1st degree burn.

Melissa was admitted to the Burn Unit of the Dr. Everett Chalmers Hospital and underwent appropriate resuscitation with intravenous fluids, urine monitoring, and clinical observation. Her progress through the resuscitated phase and in the recovery phase was uncomplicated and she progressed well. Her burns were dressed twice daily with an antibiotic cream and by the 6th of July most of the first degree and superficial second degree burn areas had healed but the deeper second degree areas amounting to approximately 19% of the body surface area and involving the back right posterior thigh, calf, and popliteal area were still open.

By the tenth post burn day all burn areas had healed except for the area around the right leg posterior thigh. This took several more days to heal and was not completely closed until the 19th day post burn. She was subsequently discharged from the hospital on the 23rd of July and followed through the office.

She was next reviewed in the office on the 15th of September, at which time her Mum related to me that Melissa was having no specific problems. Her back continued to have a light pink flush to it but no evidence of pigmentation change. The right leg and posterior thigh and calf showed a brownish-purple pigmentation in a patchy pattern. All the areas were flat and smooth without any sign of hypertrophic scarring.

Melissa was reviewed again at ten month post burn on the 24th of May, 1988. Again, there were no complaints of any specific difficulties, except for the occasional development of a rash on her legs. Her burn wounds had healed well and appeared to be fairly mature. There were no real scars evident but there was some texture change in the skin over the right leg and back.

DIAGNOSIS AND PROGNOSIS:

In summary, Melissa Dawn Turnbull a five year old girl suffered an extensive 45% body surface area scald burn of which approximately 20% turned out to be significant second degree injury. She is extremely fortunate in that a few more seconds of exposure to the hot water could well have created a fatal burn injury. Her burns healed by themselves without the need of surgical intervention and she has no scar deformity present. She does have some alteration in skin texture in the areas of deepest burn injury over the right leg and in one area on the back. I do not expect her to have any long term difficulty or disability from her burn injury but do expect the area of texture difference to be a permanent feature. It is not very noticeable to casual observation.

25 The child's mother indicated on the witness stand that the plaintiff continues to suffer from nightmares and that certain areas that were burned are more susceptible to sunburn and precautions have to be taken in that regard. Other than these two areas there do not appear to be any permanent results from the injury.

26 I assess Melissa Turnbull's general damages at $7,000.

27 The only item of special damage claimed is the Hospital Services Medicare account which according to the subrogation summary statement provided as a part of Exhibit P-1 amounts to $8,306.69. This is broken down as being $7,260 for hospital claims; $263.04 for Medicare claims and $783.65 for interest. The statement has the following note: *"the subrogation total on this statement together with all hospital and medical services after the date of this statement are subject to interest at the rate of 1.080% per month compounded monthly"*.

28 It is apparent that a subrogation summary statement had previously been provided and interest in the amount of $783.65 was calculated from the date of providing the first summary statement to the date of the summary statement which forms part of Exhibit P-1, that date being August 29, 1989. The defendant takes exception to interest being awarded on the basis claimed by the Province of New Brunswick.

29 Apart from authority granted by statute or regulation I conclude the Province of New Brunswick is not in a position to earn a higher rate of interest on its entitlement than any other aggrieved party. The Province's claim for hospitalization and medicare payments is included in this action by virtue of the requirements set out the Hospital Services Act R.S.N.B. 1973 chapter H-9

and amendments. I was not directed to any section of that statute or regulations falling from it pertaining to interest on this type of account. Accordingly the interest claimed in the subrogation summary statement is not allowed. The special damages are allowed for the hospital and medicare claims in the amount of $7,523.

30 There will be judgment for the plaintiff against the defendant in the amount of $14,523.04 with the general damages to bear interest at 12% per annum from the 10th of January 1989 and the special damages to bear interest at 6% per annum from the 1st of July 1987. The plaintiff is as well entitled to costs which I fix in the amount of $2,250 using Scale 3 of Tariff A Rule 59, and an amount involved of $15,000. In addition the plaintiff is entitled to reasonable disbursements.

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