In the Court of Appeal of Alberta

Citation: Hall v Stewart, 2019 ABCA 98

Date: 20190318
Docket: 1803-0036-AC
Registry: Edmonton

Between:

Daniel J. Hall, Dean Jay Westgeest and Brent Martin Kipps

Appellants
(Plaintiffs)

- and -

Doug Stewart

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice J.S. Little
Dated the 18th day of January, 2018
Filed the 9th day of February, 2018
(Docket: 0803 10846; 0803 10853; 0803 10854)

Memorandum of Judgment

The Court:

[1] The issue on this appeal is whether the respondent Stewart can be held personally liable for tortious conduct committed in his capacity as a director or employee of a corporation.

Facts

[2] The respondent was a director of DWS Construction Ltd., which was retained by Fekete Homes as a sub-contractor to perform work on the construction of a new home. Part of the scope of its work was to install a temporary staircase into the basement of the new home. The claimants were employees of another sub-contractor. The staircase installed by DWS Construction collapsed underneath them, causing them injuries.

[3] The staircase in question was prefabricated off-site by a third party and supplied by Fekete Homes, but was installed at the new house by DWS Construction under the supervision of and with the actual participation of the respondent. He denies that there was any negligence involved in the installation, and alleges that the staircase failed because it was overloaded, or because other unidentified workers removed the bracing holding it in place.

[4] Both DWS Construction and the claimants' employer were "employers" under the *Workers' Compensation Act*, RSA 2000, c. W-15. The claimants accordingly could not sue DWS Construction for damages relating to their injuries, but instead were compensated by the Workers' Compensation Board. The Board has brought this subrogated action against the respondent Stewart to recover the amounts it paid to the injured claimants.

[5] The respondent brought an application to summarily dismiss the action against him. He argued that any negligent act he may have committed was committed by him as part of his duties as an employee of DWS Construction, and not as an officer of that corporation. A Master in Chambers granted that application. The corporation was immune from suit, and the respondent was doing the exact act the corporation was retained to do. There was no overt or extraordinary act that took the respondent's conduct beyond the scope of his employment. On appeal, a chambers judge agreed.

[6] The appellants' threshold argument is that the case was not suitable for summary disposition because there was a dispute about material facts: whether the staircase was negligently installed. That is so, but the summary disposition of the action was based on the absence of personal liability of the respondent. There were no disputed facts about his position with the corporation DWS Construction, or with his role in the installation of the staircase. As such, it was open to the Master and the chambers judge to deal with the application for summary disposition on the assumption that the respondent's negligence could be established.

Personal Liability for Corporate Torts

[7] The central issue on this appeal is whether a corporate representative like the respondent is personally liable for damage that results from his own tortious conduct, but while he was acting as a representative of the corporation. This issue engages the legal status of corporations as separate legal persons, and the circumstances under which the "corporate veil" protects agents of the corporation from liability in tort. This case is further complicated by the involvement of the Workers' Compensation system.

The Workers' Compensation System

[8] The Workers' Compensation system represents what has been described as a "historic trade-off", by which injured workers lost their cause of action against their employers or fellow employees who were responsible for their injuries, but gained compensation that depends neither on the fault of the injured worker or his or her co-workers, nor on the employer's ability to pay: ***Pasiechnyk v Saskatchewan (Worker' Compensation Board)***, [1997] 2 SCR 890 at paras. 24-7; ***Downs Construction Ltd. v British Columbia (Worker' Compensation Appeal Tribunal)***, 2012 BCCA 392 at paras. 23-6, 38 BCLR (5th) 105. Because DWS Construction was an "employer" under the statute, if any of its workers were injured the Board would compensate them. Both those workers and DWS Construction would be immune from claims by any other worker who was injured: *Workers' Compensation Act*, s. 23.

[9] The dual regime of statutory no-fault compensation and immunity from suit does not, however, apply to "directors" of "employers", unless they purchase additional coverage from the Board:

> 15(1) Subject to section 16, an employer, a partner in a partnership, a proprietor and a director of a corporation are not workers for the purposes of this Act unless they apply to the Board in accordance with the regulations to have the Act apply to them as workers and the Board approves the application. . . .
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> 16(1) Where an individual performs any work for any other person in an industry to which this Act applies, that individual is deemed to be a worker of the other person, except when the individual
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> (a) is performing the work as the worker of another employer,
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> (b) is an employer and is performing the work as part of the business of the employer, whether by way of manual labour or otherwise,
>
> (c) is a director of a corporation and is performing the work as part of the business of the corporation, whether by way of manual labour or otherwise, . . .

The respondent had not applied for director's coverage under s. 15.

[10] Because the respondent was a director of DWS Construction, and participated in the installation of the staircase as "part of the business of the corporation", he is not covered by the workers' compensation system. Thus, if the respondent had himself been injured on the job, he would not be entitled to statutory compensation, but he would be able to sue any other workers or employers who negligently injured him. It does not matter whether the respondent participated in the installation of the staircase as a "director" or as a "carpenter working for DWS Construction". Section 15 states that a person like the respondent is "not a worker" for the purposes of the *Workers' Compensation Act*. Section 16 applies whenever the work done is "part of the business of the corporation", and does not draw a distinction between whether the work was done by the tortfeasor as an employee/carpenter or as a director.

The Corporate Personality

[11] The widespread recognition of the corporation as a separate legal person, coupled with limited liability of those associated with the corporation, was one of the most important legal-economic developments of the 19th century. The corporate legal entity allowed the conglomeration of small amounts of capital into large pools of capital needed for complex enterprises. It allowed those with managerial expertise to exploit those sums, and those with cash but no expertise to put their assets to work. A modern corporation can own property, engage in business, and sue and be sued in its own name. A key feature of corporations is that the shareholders are not personally liable for the debts and obligations of the corporation.

[12] The recognition of a separate corporate personality, and the resulting limited liability, is not a loophole or a technicality; it is an essential tool of social and economic policy. There are, however, some situations where personal liability remains, notwithstanding the concept of a separate legal personality and limited liability. While the corporation is seen as a valuable economic and social tool, it is recognized that it is a tool that can be misused. One area of potential personal liability is when officers and employees of a corporation cause damage by a tortious act. When will an employee or director be held personally liable, notwithstanding that they only acted on behalf of the corporation?

Personal Liability for Corporate Torts

[13] Finding representatives of corporations personally liable for torts engages competing policy objectives. One policy objective of the law of torts is the compensation of injured persons. A competing policy objective of corporate law is the limitation of personal liability for corporate acts.

[14] Liability in tort is primarily "personal". Tort liability generally arises when an individual owes a duty of care to an injured plaintiff, and breaches the standard of care. Corporations may in some cases owe duties of care to plaintiffs, but even then corporations must act through their

human agents. Often the human agent will owe a duty of care parallel to that of the corporation. In other cases the corporation will be vicariously liable for the acts of its employees: ***Hogarth v Rocky Mountain Slate Inc.***, 2013 ABCA 57 at paras. 112-3, 75 Alta LR (5th) 295, 542 AR 289. Thus, there will frequently be concurrent liability in the corporation and the individual tortfeasor. Whether the individual tortfeasor is personally liable for torts committed while conducting the business of the corporation will generally not be of practical importance, because the corporation or its insurer will cover the loss. The issue does become of importance where, for example:

> (a) there are limitations on the liability of the corporation, as occurred in ***London Drugs Limited v Kuehne & Nagel International Ltd***., [1992] 3 SCR 299;
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> (b) the corporation is insolvent or has insufficient assets or insurance to pay the plaintiff's claim; or
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> (c) the corporation is, for some reason, immune from suit, but the individual tortfeasor is not.

This case falls into the latter category, because of DWS Construction's immunity under the Worker's Compensation system, coupled by the subrogated claim in the Board.

[15] There can be no doubt that both the individual defendant Stewart and the corporation DWS Construction owed a duty of care with respect to the installation of the staircase to others who might be on the construction site. Without the immunity provided by the *Workers' Compensation Act*, DWS Construction would potentially be liable in tort. The individual defendant Stewart does not benefit from that immunity.

[16] Similar issues arose in ***Nielsen Estate v Epton***, 2006 ABCA 382, 68 Alta LR (4th) 34, 401 AR 63 affm'g ***Nielsen Estate v Epton***, 2006 ABQB 21, 56 Alta LR (4th) 61, 392 AR 81. In ***Nielsen Estate*** the corporate director Epton was not directly involved in the unsafe hooking of the spreader beam that led to the death of the worker Nielsen. If Epton had actually been involved in the work, he would have owed a duty of care with respect to the work itself, but his involvement was purely managerial. In order to fix Epton with personal liability in tort, it was necessary to establish that a director of a corporation owed a duty of care to "maintain a safe workplace". Thus, the decision in ***Nielsen Estate*** contains an extensive discussion about the duty of care owed by a director to individual workers, something that is not necessary on this appeal. Once a duty of care had been established, ***Nielsen Estate*** discussed whether Epton was acting "as a director". Only after that stage of the analysis did the ultimate issue arise: when is a corporate representative personally liable for torts committed while conducting the corporation's business?

[17] ***Neilsen Estate*** included an extensive discussion on whether the director Epton's conduct "as a director" had caused the damage, and whether a director owed a duty of care to individual workers. That discussion is not necessary to resolve this appeal for two reasons. First of all, the respondent Stewart was actively involved in the installation of the staircase, and so was involved

in the accident both as a director and as an employee. Secondly, amendments to s. 16 of the *Workers' Compensation Act* make this analysis unnecessary. At the time ***Neilsen Estate*** was decided, s. 16(1)(c) excluded a director from the system if he or she was "performing the work for the principal in the individual's capacity as a director of the corporation". Section 16(1)(c) was subsequently amended to broaden the exclusion to whenever the work was a "part of the business of the corporation". It is therefore no longer necessary to identify whether the work was being done "as a director" or in some other capacity.

[18] The law on when personal liability will attach to corporate torts is not clear. The case law was surveyed in the concurring reasons in ***Rocky Mountain Slate*** at paras. 75ff. A number of relevant factors have been identified by the courts:

> (a) Whether the negligent act was committed while engaged in the business of the corporation, and whether the negligence of the employee was contemporaneous with that of the corporation: ***London Drugs*** at pp. 405-6; ***ADGA Systems International Ltd. v Valcom Ltd.*** (1999), 43 OR (3d) 101 at paras. 18, 43 (CA), leave refused [2000] 1 SCR xv;
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> (b) Whether the individual was pursuing any personal interest beyond the corporate interest: ***ADGA Systems*** at paras. 18, 43;
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> (c) Whether the director or corporate representative owed a separate and distinct duty of care towards the injured party: ***Rocky Mountain Slate*** at paras. 118ff; ***Nielsen Estate*** at paras. 20-22;
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> (d) That the conduct was "in the best interests of the company";
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> (e) Whether the plaintiff voluntarily dealt with the limited liability corporation, or had the corporate relationship "imposed" on it: ***London Drugs*** at pp. 405-6; ***ADGA Systems*** at para. 43;
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> (f) The expectations of the parties: ***Cooper v Hobart***, 2001 SCC 79 at para. 34, [2001] 3 SCR 537. Was it reasonable for the plaintiff to think that the individuals involved would be personally responsible for any damage that resulted? In the area of negligent misrepresentation, this factor takes on a particular importance: was it reasonable for the plaintiff to rely on the representation coming from the individual, rather than the corporation?: ***Hercules Managements Ltd. v Ernst & Young***, [1997] 2 SCR 165 at paras. 24-6; ***Rocky Mountain Slate*** at para. 131;
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> (g) Whether the tort was "independent". The cases sometimes say that the employee or individual is liable for his or her "independent" torts, implying that there are some torts which are so closely identified with corporate activity that they are not fairly categorized as "individual torts" as well: ***London Drugs***; ***ScotiaMcLeod Inc. v Peoples Jewellers Ltd***. (1995), 26 OR (3d) 481 at paras. 25-6 (CA), leave refused [1996] 3 SCR viii; ***Blacklaws v***

Morrow, 2000 ABCA 175 at para. 41, 84 Alta LR (3d) 270, 261 AR 28, leave refused [2001] 1 SCR vii; ***Rocky Mountain Slate*** at paras. 112ff. However, in ***Peracomo Inc. v TELUS Communications Co.***, 2014 SCC 29 at paras. 16-7, [2014] 1 SCR 621 varying ***Peracomo Inc. v Société TELUS Communications***, 2012 FCA 199 at para. 43, 433 NR 152 it was held that the (intentional) tort was essentially individual, and the issue was more correctly whether the corporation was responsible for the individual tort, not the other way around;

(h) The case law clearly recognizes the exception in ***Said v Butt***, [1920] 3 KB 497, specifically respecting claims of inducing breach of contract, without identifying whether it is a narrow or wide exception, nor the principles upon which it is based;

(i) The nature of the tort, and particularly whether it was an intentional tort: ***Peracomo Inc.***, SCC at paras. 16-7, FCA at para. 43; ***Hercules Managements*** at paras. 21, 25-6; ***ScotiaMcLeod*** at paras. 25-6; ***ADGA Systems*** at para. 43; ***Blacklaws v Morrow*** at para. 41;

(j) Whether the damage was physical or economic: ***Peracomo Inc.*** SCC at paras. 16-7; ***London Drugs***; Hercules ***Managements*** at paras. 21, 25-6; ***Blacklaws v Morrow*** at paras. 42-3; ***Rocky Mountain Slate*** at para. 131. This partly relates to accessibility to insurance, which is more common for physical damage: ***London Drugs*** at pp. 339-41.

These factors can be seen as being part of a generalized concern about the effect that individual liability can have on the viability of corporate structures and their efficacy. While it is undesirable to decide on a case-by-case basis if a corporate actor is personally liable in tort, a comprehensive and integrated test remains elusive: S. O'Byrne, Y. Philip, and K. Fraser, "The Tortious Liability of Directors and Officers to Third Parties in Common Law Canada", (2017) 54:4 Alta L Rev 871 at pp. 871-3, 897.

[19] The competing policy objectives of tort law and corporate law must be reconciled in context. One important factor is the ready availability of insurance for property damage and personal injury. One obvious source of personal injury insurance is the workers' compensation system itself. However, even if a corporation does not elect to purchase director's insurance within the workers' compensation system, general commercial liability insurance coverage is widely available for personal injury and property damage. In assessing whether a corporate representative should be exposed to personal liability for corporate torts, it must be acknowledged that the underlying risk can readily be managed and diverted through the purchase of appropriate insurance. Balanced against this factor is the reality that mere employees (unlike directors like the respondent) have little control over corporate decisions to insure. Whether the respondent actually purchased commercial general liability insurance is not the point; the point is that such insurance was available to him, and if he did not purchase it he must have elected to assume the underlying risk himself. He could not, by his decision, seek to pass the risk of recovery of personal injury damages onto injured claimants like the appellants.

[20] In this case the plaintiffs' claim is being pursued by the Board, which is subrogated to their rights: *Workers' Compensation Act*. s. 22(3). That does not affect the outcome, because a tortfeasor does not derive any benefit from a plaintiff's insurance where a right of subrogation exists: ***Ratych v Bloomer***, [1990] 1 SCR 940 at pp. 982-3. Many tort claims are in fact subrogated claims being pursued by insurance companies that have paid out the losses incurred by their insured customer. The insurance company is entitled to pursue the claim to recover the amounts it has paid under the insurance, and the tortfeasor is not entitled to argue that the plaintiff has not suffered any actual loss because of those payments. The exceptions to that principle discussed in ***Cunningham v Wheeler***, [1994] 1 SCR 359 do not apply here, because the Board is subrogated. Because this is a subrogated claim there can be no "double recovery". Thus, the involvement of the Board in this litigation does not affect the outcome.

[21] This case is complicated by the involvement of the workers' compensation system, but as just noted that does not affect the ultimate outcome. The respondent cannot have the benefits of that system (i.e., immunity from suit) without also bearing the burdens. One of the burdens that the respondent has avoided is the requirement that as a director who wants to be insured under s. 15, he must pay the premiums that support the system. The other avoided burden is that he has not had to give up his right to sue other workers or employers who negligently injure him. As an uninsured person participating in the activities at the new home construction site outside the workers' compensation system, he was subject to the ordinary laws governing torts and corporations.

[22] In this case the injured claimants would have anticipated that all the work done on the site would be done through corporate entities with limited liability. While the claimants would have anticipated receiving compensation from the Board for any injuries they suffered, that does not negate the Board's expectation that it could pursue subrogated claims against tortfeasors outside the system. The work that caused the injury was clearly done on behalf of the corporation, was in the best interest of the corporation, and did not reflect any personal interest of the respondent. It could not be said that the respondent's allegedly negligent conduct was in any respects "independent" of the business of the corporation. These factors would tend to negate personal liability.

[23] The deciding factor in this case, however, is the nature of the damage: personal injury. A number of the cases where individual liability has been found for corporate torts concern physical damage or personal injury: ***Peracomo Inc.***; ***London Drugs***; ***Nielsen Estate.*** There is clearly a "duty of care" to avoid injuring one's co-workers, and no residual policy considerations to exclude liability: ***Rocky Mountains Slate*** at paras. 127-8. Anyone who agrees to install a staircase clearly owes a duty of care to those who are likely to use that staircase. Although the respondent's tort was not at all "independent" of the corporation DWS Construction, the modern corporation was not designed to be a method of providing immunity to corporate actors for this sort of loss. There are strong public policy reasons to ensure that physically injured plaintiffs are compensated. Claims for pure economic loss raise different issues.

[24] A similar situation would arise if the respondent had been moving a piece of equipment owned by DWS Construction from one construction site to another. If he negligently ran over someone with that equipment, he would properly be responsible for the personal injuries that resulted. He could not successfully argue that he was only operating the equipment in his capacity as an employee or director of DWS Construction, and that he was not personally liable for what he had done. It also should not matter whether the person he ran over was a third party civilian, or a "worker" covered by the *Workers' Compensation Act*. The separate corporate personality was never designed to immunize tortfeasors in that situation. (Of course, if the corporate equipment was a "motor vehicle", it should properly be covered by the mandatory insurance required for such vehicles, but the underlying common law principle is the same.)

[25] It follows that the respondent cannot escape personal liability for any personal injuries he caused to the claimants as a result of a negligent act, even though his involvement in the construction of the staircase was a part of the business of the corporation DWS Construction.

Conclusion

[26] In conclusion, the appeal must be allowed, and the summary dismissal of the action set aside. That does not, however, resolve the action. There was no cross application by the plaintiffs for summary judgment in their favour. There is a remaining dispute as to whether the staircase was negligently installed, whether that negligence caused it to fail, and if the claimants' injuries resulted from that negligence. Those issues will have to be explored at trial or in another dispute resolution forum.

Appeal heard on January 8, 2019

Memorandum filed at Edmonton, Alberta
this 18th day of March, 2019

Watson J.A.

Slatter J.A.

Authorized to sign for: O'Ferrall J.A.

Appearances:

G.W. Coombs
for the Appellants

M.J. Marchen
for the Respondent