

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

	)	<i>J. A. Kagan and</i>
	)	<i>A. M. Mariani</i>
<i>WILLIAM HENRY CARLSON</i>	)	<i>for the Appellants</i>
)	
<i>(Plaintiff) Respondent</i>	)	<i>J. J. A. Hogue and</i>
	)	<i>R. C. Roy</i>
<i>- and -</i>	)	<i>for the Respondent</i>
)	
<i>MARIE LOUISE DUNN and RONALD</i>	)	<i>Appeal heard and</i>
<i>RISPLER</i>	)	<i>Decision pronounced</i>
	)	<i>August 31, 2020</i>
<i>(Defendants) Appellants</i>)	
	)	<i>Written reasons:</i>
	)	<i>September 11, 2020</i>

On appeal from 2019 MBQB 144

PFUETZNER JA (for the Court):

[1] The defendants appeal a finding of liability in connection with an incident where the plaintiff suffered severe injuries after falling off the roof of the garage attached to the defendants’ house. The defendant Dunn (Dunn) is the owner of the house and the defendant Rispler (Rispler) is her spouse. At the hearing of the appeal, we allowed the appeal in part with brief reasons to follow. These are those reasons.

[2] The trial judge found that the plaintiff, who was a contractor with significant roofing experience, attended on the roof with Rispler to inspect work that Rispler had recently performed. The plaintiff was standing a few feet behind Rispler while Rispler was crouched down opening an access door into the attic space in the gable end of the main roof of the house. Rispler stood up, lost his balance and stumbled back, striking the plaintiff, who fell headfirst off the roof onto the driveway. The trial judge rejected Rispler's evidence that he did not make contact with the plaintiff, but that the plaintiff accidentally stepped off the roof.

[3] The trial judge found Rispler and Dunn liable to the plaintiff. In doing so, he appeared to accept the plaintiff's argument that liability was grounded in both the tort of negligence and under *The Occupiers' Liability Act*, CCSM c O8 (the *OLA*). The trial judge assessed the plaintiff as 33.33 per cent contributorily negligent because he failed to wear his safety harness. The issue of damages had previously been severed to be tried at a later time.

[4] The defendants argue that the trial judge made errors in his factual findings, in his findings of negligence and in his order of costs.

[5] First, the defendants argue that the trial judge relied on facts that were not in evidence in rejecting Rispler's version of events as not credible. In addition, they maintain that the trial judge misapprehended evidence when he accepted only part of a neighbour's evidence on a critical issue without providing an explanation.

[6] Next, they assert that the trial judge performed no negligence analysis—that is, he did not determine if a duty of care was owed to the plaintiff or if the standard of care was breached. The defendants also argue

that, if the finding of liability is upheld, the trial judge should have found the plaintiff to be 60 per cent contributorily negligent as he was an experienced roofer. Moreover, they submit that there was no basis to find Dunn liable as she was not present at the time of the accident. In response to a concern raised by the Court at the hearing that counsel was advancing a submission in relation to Dunn where the interests of the two defendants were not aligned, Mr. Kagan advised that, because of an agreement to indemnify, there would be no prejudice to the interests of the plaintiff if this Court were to allow Dunn's appeal but not Rispler's.

[7] Finally, the defendants argue that the trial judge should not have ordered costs in favour of the plaintiff as the damages portion of the trial was still outstanding.

[8] The plaintiff argues that the trial judge made no palpable and overriding errors in assessing credibility, making factual findings or in finding and apportioning negligence. The plaintiff says that it was within the trial judge's discretion to order costs for this part of the trial in favour of the plaintiff.

Analysis

[9] The trial judge's factual findings, credibility assessments and findings of negligence are reviewable on the standard of palpable and overriding error. As stated in *Housen v Nikolaisen*, 2002 SCC 33 (at para 29): "When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts."

[10] The key issue in this case was for the trial judge to determine what happened on the roof of the defendants' garage. The trial judge reviewed the evidence, made determinations as to the credibility and reliability of the witnesses, and made factual findings—as he was required to do. We are not persuaded that he made any palpable and overriding errors in doing so. Nor are we persuaded that his findings of negligence on the part of Rispler or the contributory negligence of the plaintiff were the result of palpable and overriding error.

[11] The trial judge did not articulate the basis of Dunn's liability. In contrast, he made Rispler's liability clear (at para 105):

... Rispler was negligent by propelling [the plaintiff] off the roof. He breached the duty of care and the standard of care of a homeowner to do no harm to the person permitted to go onto their roof to inspect. The actions of Rispler caused the damage to [the plaintiff]. ...

[12] We agree with the defendants that there was no basis, in the circumstances of this case, for the trial judge to impose liability on Dunn. She was not involved in the act of propelling the plaintiff off the roof. The idea that Rispler was acting as her agent was not pled or argued at trial. Nor are we persuaded that there is a basis for Dunn's liability under the *OLA*.

[13] Finally, we are not convinced that the trial judge erred in ordering costs of this stage of the trial in favour of the plaintiff. Section 96(1) of *The Court of Queen's Bench Act*, CCSM c C280, provides, in part, that “the costs of . . . a step in a proceeding, are in the discretion of the court”. Unless a costs order is based on an error in principle or is plainly wrong, an appellate court

will not intervene (see *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27).

[14] For these reasons, the appeal was allowed to the extent that the trial judge's finding of liability against Dunn was set aside. The appeal by Rispler was dismissed and the judgment against him stands as ordered by the trial judge. As the plaintiff was substantially successful, he shall have his costs in this Court.

"Pfuetzner JA"

"Beard JA"

"Mainella JA"