COURT OF APPEAL FOR ONTARIO

CITATION: Turcotte v. Lewis, 2018 ONCA 359
DATE: 20180413
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Strathy C.J.O., Juriansz and Huscroft JJ.A.

BETWEEN

Ryan Turcotte,
Rick Turcotte and Kerry Turcotte

Plaintiffs (Appellants)

and

Aaron Lewis, Courtney Lewis, First Student Canada,
1853780 Ontario Inc. o/a Kee to Bala,
Ryan Zaroski, David Ribble,
John Doe 1 and John Doe 2

Defendants (Respondents)

Anita W.H. Wong and Scott Hawryliw, for the appellants

Roger H. Chown and Marie Hynes, for the respondents, First Student Canada and David Ribble

Andrew A. Evangelista and Justine Ajandi, for the respondents, Ryan Zaroski and 1853780 Ontario Inc. o/a Kee to Bala

Heard: December 8, 2017

On appeal from the judgment of Justice Susan E. Healey of the Superior Court of Justice dated March 20, 2017, with reasons reported at 2017 ONSC 1773.

Strathy C.J.O.:

[1] Ryan Turcotte ("Turcotte") and his parents appeal the dismissal of their action against the respondents on two motions for summary judgment.

[2] On June 25, 2012, Turcotte attended "resort night" at the Kee to Bala bar (the "Kee"), operated by the respondent 1853780 Ontario Inc. He returned to Barrie early the next morning on a bus chartered by the Kee from the respondent First Student Canada ("First Student") and driven by the respondent David Ribble ("Ribble"). The respondent, Ryan Zaroski ("Zaroski"), was hired by the Kee as a security guard at the bar and on the bus.

[3] The defendants, Aaron Lewis and Courtney Lewis, are cousins. Aaron Lewis was a passenger on the bus. At some point before the bus arrived in Barrie, Aaron Lewis contacted Courtney to ask him to meet the bus at its drop-off point.

[4] Almost immediately after he stepped off the bus, Turcotte was allegedly assaulted by Aaron Lewis, Courtney Lewis and other unknown assailants. He sustained a serious head injury. He sued Aaron Lewis, Courtney Lewis and the respondents. He claimed that the assault was foreseeable and that the respondents had failed to take reasonable care to prevent it.

[5] The respondents, First Student and Ribble, brought a motion for summary judgment.[1] The Kee and Zaroski brought a second motion for summary judgment. The motions were heard together.

[6] There were two issues on the motions. First, whether the case was suitable for disposition by summary judgment. The motions judge held it was. Second, whether the moving parties, the respondents on this appeal, had met the applicable standards of care. The motions judge held they had. She granted their motions, dismissing the action.

[7] For the reasons that follow, I find that the motions judge failed to fully articulate and apply the standard of care, effectively treating Turcotte's contributory negligence as a bar to his claim. In my view, the summary judgment should be set aside and the matter should be remitted to the Superior Court of Justice for trial.

A. THE FACTS[2]

[8] On Mondays during the summer, the Kee held "resort nights", attracting resort and tourism staff in the Muskoka region. The ten dollar cover charge included a bus service, which picked up guests from various locations in the region, brought them to the bar, and returned them at the end of the evening. The buses typically arrived at the Kee at 11:00 p.m. and departed at around 1:30 a.m.

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[1] Aaron Lewis and Courtney Lewis had been noted in default. The two other perpetrators of the assault have not been identified.

[2] Much of this summary comes from the motions judge's thorough findings of fact, which are not in dispute.

[9] The Kee had a capacity of 1,215 customers. It had a "robust" security system on resort nights, no doubt necessary to deal with the predictable effects of the combination of youth and alcohol. In addition to 15 provincially licenced security guards, there were paid duty police officers on the premises, as well as on-duty police officers stationed outside. Police sometimes parked a prisoner transport van outside the bar. Measures were taken to prohibit intoxicated patrons from boarding the buses at the pick-up point and to prevent alcohol from being brought on board. The busing program, and the security measures, had been developed by the Kee and the police to discourage drinking and driving and to provide a safe environment for the Kee's customers.

[10] The Kee had a security protocol for the buses. In the event of an altercation, the security guard, who travelled with the bus in both directions, was to separate those involved and to telephone police if there was a concern that violence could flare up on arrival. Security guards were entitled to remove patrons from the bus if they considered it necessary to do so.

[11] On the night in question, the bus left the Kee between 1:30 and 2:00 a.m. It was driven by Ribble and bound for its original pick-up point, Duckworth Plaza, in Barrie. The trip to Barrie took about an hour. The bus had approximately 48 passengers on board, including Turcotte and Aaron Lewis, both of whom had been at the Kee. Zaroski was the security guard on board. In accordance with the Kee's

security protocol, he sat at the front of the bus, facing backwards, to keep an eye on the passengers.

[12] Shortly after the bus left the Kee, a dispute arose after Zaroski ejected a female passenger for smoking on board. Zaroski saw Aaron Lewis push Turcotte. He went to the back of the bus and separated them. Turcotte moved to the front of the bus, away from Aaron Lewis. Zaroski testified that although he assumed that both Turcotte and Aaron Lewis had been drinking, he did not see signs of intoxication.

[13] The separation of Turcotte and Aaron Lewis ended physical aggression on the bus, but there was continued jeering and shouting coming from the back of the bus directed towards the front, where Turcotte was seated. Zaroski's evidence was that the noise and tension levels increased about halfway to Barrie. Some of the aggressive language was coming from Aaron Lewis.

[14] Zaroski testified that the noise level increased once again when the bus was about ten minutes outside Barrie. He learned that someone at the back of the bus had "called ahead for backup". Concerned that the situation might escalate and that violence might occur between Turcotte and Aaron Lewis when they got to Duckworth Plaza, Zaroski called police in Barrie, asking that a cruiser meet the bus on arrival. Ribble slowed the bus in the hope of allowing police time to arrive at the plaza.

[15] Various individuals were present in the plaza when the bus arrived. Some were there to pick up passengers, but others had received calls or text messages from passengers, asking them to come, presumably as "backup". Two of Turcotte's friends were asked to come, but there was no evidence of who had asked them to do so. Courtney Lewis received two calls from his cousin, Aaron Lewis, asking him to come.

[16] Zaroski noticed Courtney Lewis in the plaza as the bus arrived. He did not know that Courtney Lewis was Aaron's cousin. However, he recognized Courtney from his work doing security at bars in the Barrie area. He knew from these experiences that Courtney had a tendency to get involved in physical altercations.

[17] Police had not yet arrived at Duckworth Plaza when the bus got there. Zaroski was still on the phone with them. Concerned for Turcotte's safety, Ribble and Zaroski let him off first, to give him a "head start", telling him not to stick around the plaza.

[18] Turcotte was one of the first to get off the bus, through the front door, followed by others through the front and rear doors. But he did not leave the plaza immediately. He walked some 8 to 20 feet away and stopped. Within a minute, he was surrounded by a group that included Aaron and Courtney Lewis. He was punched and fell to the ground, striking his head on the pavement. He suffered a traumatic head injury, resulting in permanent deficits, including problems with his

cognitive functions and memory. Police arrived at the plaza about two minutes later.

[19] Aaron and Courtney Lewis were convicted of aggravated assault and were sentenced to terms of imprisonment of two years less a day. Their appeals to this court were allowed: see *R. v. Lewis*, 2018 ONCA 351.

B. THE SUMMARY JUDGMENT MOTIONS

[20] There was an extensive evidentiary record adduced on the summary judgment motions. It included:

- affidavits of Turcotte, Ribble, Zaroski and a representative of the Kee;
- transcripts from the examinations for discovery; and
- transcripts of Turcotte, Ribble and Zaroski at the criminal trial.

[21] The motions judge had presided at the criminal trial of Aaron and Courtney Lewis. The parties consented to her presiding on the summary judgment motions.

[22] No expert evidence was filed at the summary judgment motions concerning the standard of care applicable to the respondents.

[23] The motions judge found that the case met the test for summary judgment in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. In her view, all the relevant evidence was before the court, the vast majority of facts were not in dispute and, although there were some inconsistencies in prior statements given by Ribble and

Zaroski, there were no conflicts in their evidence that were material to the issue of negligence.

[24] Taking the evidence of Ribble and Zaroski at its most favourable to the appellants (as the respondents proposed the judge could), the motions judge accepted, at para. 71, for the purpose of the motions that "both Zaroski and Ribble knew that: tensions were escalating as the bus approached Barrie; someone had called for 'backup'; one protagonist was Aaron Lewis; and the likely target of his anger was Turcotte." She found that any inconsistencies in their evidence was immaterial in the face of these admissions.

[25] She found as well, at para. 71, that:

> Ribble was aware of the fact that a call had been placed to the police by Zaroski, and both were concerned about the escalation of tension on the bus and the possibility that there might be an altercation in the Plaza involving Turcotte. Both knew that the police were not there when the bus arrived, and both suggested to Turcotte that he get off of the bus and not remain in the Plaza. In the view of this court, the standard of care is informed by these essential facts.

[26] The motions judge identified, at para. 74, what she described as the only disputed fact that impacted on the applicable standard of care, namely, "Turcotte's level of awareness of the danger that he was in, to the extent that that could have been foreseen." Turcotte had made conflicting statements – first in his statement to police, when he had difficulties in recollection due to his brain injury; then at the criminal trial, where he claimed to recollect "many key details ... that had been

previously forgotten by him due to his brain injury." However, the motions judge concluded, at para. 74:

> An assessment of the reliability of Turcotte's evidence is something that can be accomplished without him taking the witness stand once again. Accordingly, although his state of knowledge and awareness is a triable issue, it is not necessary to have a trial in order to determine what that was. The evidence necessary to make such a determination is before the court, as will be explained below.

[27] The motions judge held that the case was ideal for summary judgment as such an approach would provide a fair and just adjudication in which the necessary fact-finding could be done and the law applied based on the record before the court in a cost-effective and efficient manner.

[28] The motions judge rejected the appellants' submissions that expert evidence was required to determine the standard of care. She found, at para. 76, that the standard of care applicable to Ribble and Zaroski was that of "an ordinary, reasonable and prudent bus driver and security guard, in the circumstances of the case."

[29] She rejected the allegations that the respondents failed to keep either the Kee or the bus reasonably safe, or that there was negligence in relation to any acts or omissions at the Kee or on the bus trip. There was no evidence that any of the parties involved in the altercation were intoxicated, or that they had been over-served at the Kee. The respondents fulfilled their duty to take reasonable steps to

ensure that Turcotte was safe while he was at the Kee and while being transported to Duckworth Plaza.

[30] She also rejected allegations that the respondents failed to take measures in response to the escalating tension on the bus, such as diverting from the route and going to a police station or other secure location. Zaroski had followed the protocol by separating the antagonists, monitoring the situation and calling police to request that a cruiser meet the bus at the plaza. Ribble was responsible for driving the bus and not for security.

[31] Nor were the respondents responsible for failing to call out to the assailants to break up the confrontation after Turcotte left the bus. Events happened quickly and verbal commands were not likely to have been effective in the circumstances.

[32] The motions judge held that the sole issue for trial was whether the respondents should have prevented Turcotte from leaving the bus when they knew or ought to have known that a situation of danger was imminent. She concluded that they could not have known that Turcotte would stop in the parking lot instead of following their suggestion that he move along. Nor did they have authority to detain a passenger on the bus. While the potential for a physical altercation was foreseeable, to suggest that they should have known that one was imminent or inevitable "would require impossible clairvoyance."

[33] She found, at para. 93, that:

> The only basis upon which an argument could be made for either Ribble or Zaroski having fallen below the expected standard is if the circumstances were such that Turcotte was unaware that he was in danger once the bus had arrived at the parking lot. In those circumstances, Ribble and/or Zaroski's failure to advise him of their concern that a physical altercation might take place in the Plaza may be said to create an unreasonable risk of harm to Turcotte.

[34] But the motions judge rejected Turcotte's evidence that he was unaware of the risk, finding that his recollection of the events of the evening was not reliable and was in conflict with the evidence of Zaroski, whom she found to be a careful and credible witness. Zaroski testified that Turcotte was involved in the yelling and profanity on the bus; had been moved to the front of the bus after being pushed by Aaron Lewis; had been sitting at the front of the bus beside Zaroski; and was sitting beside him when Zaroski was informed that someone at the back of the bus had called for "backup". When the bus arrived at the plaza, Zaroski told Turcotte that he should "not hang around and make off to wherever he was going". Instead Turcotte got off the bus and stood about 20 feet away.

[35] The motions judge held that Ribble and Zaroski acted reasonably in letting Turcotte off the bus and giving him a "head start", and could not be faulted if Turcotte ignored their advice and remained in the plaza. She concluded, at paras. 96 and 97:

> All of this leads the court to the conclusion that Turcotte was as aware of the circumstances that existed that night as Ribble and Zaroski were. He was aware of the

> potential for a physical altercation, and yet still got off the bus and remained in the parking area. There is no reason to hold either of these defendants to a higher standard. Even if a physical altercation involving Turcotte was foreseeable to Ribble or Zaroski, they had no absolute duty to ensure that Turcotte avoided harm or that no harm came to him once he got off the bus. Ribble and Zaroski both acted reasonably in letting Turcotte off the bus first, effectively giving him a "head start", and Zaroski acted reasonably in suggesting that he continue on his way immediately. When they did so, they had every reason to believe that Aaron Lewis would be exiting out the front, as he did, and it was reasonable that they not have Lewis pass in front of Turcotte as he was exiting. It was not until Turcotte exited the bus that the alarm sounded to alert either to the possibility that Lewis might exit through the back, and in any event, this did not occur. These defendants are not responsible for the fact that Turcotte chose to ignore the advice given to him that he leave immediately. These defendants could no more have foreseen that Courtney Lewis, and perhaps others, would strike Turcotte than he himself could have foreseen.
>
> As the evidence shows that at no time did the conduct of any of these defendants fall below the standard of care required of them in all of the circumstances, I must dismiss the action against them in its entirety.

C. ISSUES

[36] There are two issues on this appeal:

1. Did the motions judge err in concluding that this was an appropriate case for summary judgment?
2. Did the motions judge err in her assessment of the standard of care?

D. THE PARTIES' SUBMISSIONS

[37] The appellants make two principal submissions. First, they submit that the summary judgment motions were premature and inappropriate. Premature because expert reports had not been filed and a police report was not yet available. Inappropriate because a paper record was unsuitable for the resolution of credibility issues, including the credibility of Turcotte's assertion that he was not aware of the danger he faced in getting off the bus.

[38] Second, they submit that the motions judge's duty of care analysis was flawed because it limited the scope of the duty to events on the bus, rather than in the parking lot, and failed to impose a duty on the respondents to take measures to avoid putting Turcotte in a situation of danger, given their knowledge of the risk.

[39] The respondents submit that this was an appropriate case for summary judgment, for the reasons given by the motions judge. The appellants did not seek an adjournment to file expert or other evidence. The approach taken by the motions judge was reasonable and practical, particularly in light of the respondents' submission that any conflicts in the evidence could be resolved in the manner most favourable to the appellants.

[40] The respondents further submit that the motions judge's findings related to the standard of care are entitled to deference. The motions judge applied the "but for"

test of causation and found that any failure of the respondents to inform Turcotte of the risk was not causative, because he himself was aware of the risk.

E. ANALYSIS

(1) Summary Judgment

[41] The appellants did not tender expert evidence on the standard of care, nor did they seek an adjournment of the motions to obtain either expert evidence or a police report. They did not seek to cross-examine affiants and were content to use discovery transcripts supplemented by some evidence from the criminal trial. Nor did the appellants ask the motions judge to use the fact-finding powers available to her under r. 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. They agreed to the motions judge presiding on the motions, even though she had conducted the criminal trial.

[42] The motions judge's conclusion that the case was suitable for summary judgment is entitled to deference: *Hryniak*, at para. 81. I would not give effect to the appellants' submissions on this issue.

(2) Standard of Care

[43] It is useful to begin the analysis with first principles. A plaintiff suing in negligence must establish that: (1) the defendant owed him or her a duty of care; (2) the defendant's conduct breached the applicable standard of care; (3) the plaintiff sustained compensable damage; and (4) the damage was caused, in fact

and in law, by the defendant's breach. See *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, 416 D.L.R. (4th) 32, at para. 77; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 96; *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98, at para. 24.

[44] In this case, it is acknowledged that the respondents owed Turcotte a duty of care. It is also clear that Turcotte sustained compensable damages. The real issues to be resolved are the standard of care and causation.

[45] The standard of care defines the content of the duty of care and depends on the context: *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, at p. 1198. In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, a case considered by the motions judge, Major J. described, at pp. 221-222, the factors to be considered in the articulation of the standard of care:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[46] The causation analysis asks whether, applying the "but for" test, there is a causal connection between the breach of the standard of care and the compensable damage suffered. The test asks whether the damage would not have occurred "but for" the defendants' negligence: *Hill*, at para. 93.

[47] The respondents conceded they owed a duty of care to Turcotte. As noted above, the motions judge found that the standard of care was "that of an ordinary, reasonable and prudent bus driver and security guard, in the circumstances of the case." But she did not refine the standard of care beyond that general statement. Nor did she define what the standard of care required in the circumstances as they unfolded during the bus ride or when the bus arrived at the plaza. Nor did she articulate her conclusions on the likelihood of foreseeable harm, the gravity of that harm or the reasonableness of measures that could be taken to prevent it. These factors inform the standard of reasonable care.

[48] Instead, the motions judge defined the respondents' standard of care by reference to Turcotte's "level of awareness of the danger that he was in". She absolved the respondents of responsibility because Turcotte was as aware of the risk as they were. As she put it, at para. 96, "[t]here is no reason to hold either of these defendants to a higher standard."

[49] Respectfully, this truncated the standard of care analysis. It put the responsibility of avoiding the risk entirely on Turcotte, without considering the

content of the respondents' duty to him, given their knowledge and appreciation of the risk and their ability to avoid the risk.

[50] The motions judge also found that Ribble and Zaroski were not responsible for the fact that Turcotte ignored their advice to leave immediately. While that may go to the issue of whether Turcotte was contributorily negligent – an issue the motions judge did not address – it would not necessarily relieve them from liability if their breach of the standard of care put him in a dangerous position. Nor would it necessarily relieve them from liability if Turcotte had remained in the plaza for reasons they could have foreseen – for example, because he had to wait for a ride home.

[51] A finding that the respondents breached the standard of care would not hold them to a higher standard than Turcotte. It would hold them to a different standard: the standard of care applicable to those who are charged with the transportation and security of patrons of the bar – patrons who have paid a fee for the purpose.

[52] Cases such as *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, and *Murphy v. Little Memphis Cabaret Inc.*, [1996] O.J. No. 4600 (Gen. Div.), while not on all fours, are instructive. In both cases, an inebriated customer was injured after being ejected from a bar. Menow was hit by a car. Murphy was attacked by four other patrons who had also been ejected from the bar. In both cases, the bar was held liable. In *Murphy*, the trial judge found, at para. 16, that "the tavern owner had an obligation to exercise reasonable care in expelling [the plaintiff] from the tavern in

view of the fact that imminent danger which originated within the tavern awaited him outside the door."

[53] The judge found that, as in *Jordan House*, an inordinate burden would not be placed on the tavern keeper in requiring him to take preventative measures, for example, by keeping the plaintiff inside the tavern until the hostile foursome had departed, or by calling a taxi or calling police.

[54] *Jordan House* was applied by the Supreme Court of Canada in *Crocker*. In that seminal case, it was held that a ski resort had a positive duty to prevent a visibly intoxicated patron from participating in a dangerous tubing competition. Wilson J., who delivered the judgment of the court, summarized the application of *Jordan House*, at pp. 1196-97:

> The general approach taken in *Jordan House* has been applied in a number of cases. Car owners who have permitted or instructed impaired persons to drive their cars have been found liable (see: *Hempler v. Todd* (1970), 14 D.L.R. (3d) 637 (Man. Q.B.), and *Ontario Hospital Services Commission v. Borsoski* (1973), 54 D.L.R. (3d) 339 (Ont. H. Ct.)) as has the owner of a motorcycle who allowed a young unlicensed driver to use it (see: *Stermer v. Lawson* (1977), 79 D.L.R. (3d) 366 (B.C.S.C.)). The common thread running through these cases is that one is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury. The plaintiff's inability to handle the situation in which he or she has been placed – either through youth, intoxication or other incapacity – is an element in determining how foreseeable the injury is. The issue in the present appeal is whether the relationship between Sundance and Crocker gave rise to this kind of duty. [Emphasis added.]

[55] Wilson J. agreed, at p. 1197, with Dubin J.A. in this court that the duty in that case was to "take all reasonable measures to prevent the plaintiff from continuing to participate in the very dangerous activity which was under its full control and supervision and promoted by it for commercial gain when it became apparent that the plaintiff was drunk and injured". The plaintiff had not voluntarily assumed the risk, but his voluntary intoxication could be and was taken into account in fixing him with 25 percent contributory negligence.

[56] These cases are, of course, distinguishable on their facts, including the fact that, in both *Jordan House* and *Crocker*, the plaintiffs' extreme intoxication made them vulnerable and enhanced the risk and the standard of care. The cases have, however, the "common thread" referred to by Wilson J., of imposing a duty "not to place another person in a position where it is foreseeable that that person could suffer injury."

[57] In my view, the motions judge significantly understated the standard of care. The Kee operated a bar, which catered to a large number of youthful patrons. It provided transportation, through the services of First Student, so that its patrons could drink without driving. The Kee provided security, at the bar and on the bus, to address the foreseeable risk of violence between patrons. The individual respondents, Ribble and Zaroski, were part of the transportation and security system and were trained in their respective responsibilities to deal with foreseeable risks, including the risks posed by unruly or violent passengers.

[58] There were conflicts and inconsistencies in the evidence of the individual respondents concerning the events on the bus. These conflicts and inconsistencies were not resolved by the motions judge because of her decision to take the evidence most favourable to the appellants. But on any version of the evidence the individual respondents were aware of a clear and substantial risk of violence when the bus arrived in Barrie. The events on the bus, the escalating tensions and shouting and the call for "back up" made a violent confrontation reasonably foreseeable. The individual respondents knew that Turcotte was a likely target of violence and that the risk came from someone on the bus (Aaron Lewis) and from those waiting in the plaza (the "back up"). The risk of violence was sufficiently high to warrant calling police to meet the bus on its arrival at the plaza in Barrie.

[59] The motions judge found that while the potential for a physical altercation was foreseeable, the individual respondents could not have known that it was "imminent or inevitable". This misstated the standard of care. The test is whether harm was reasonably foreseeable. In this case, it clearly was.

[60] The motions judge's abbreviated assessment of the standard of care led her to understate the means available to the respondents to avoid putting Turcotte in the midst of a dangerous environment or to take measures to protect him when he did get off the bus. For example, by telling him not to get off the bus until police arrived. Or by Zaroski accompanying him to a place of safety. Nor was there any

satisfactory evidence of why, if the police were only two minutes away, some measures could not be taken to delay either the arrival of the bus or Turcotte's exit.

[61] While some of these issues go to security, others go to the duties of First Student and Ribble, as carriers, to guard against reasonably foreseeable dangers to passengers from external causes: see *Domanski v. Hamilton*, [1959] O.R. 262 (C.A.), at pp. 270-271.

[62] I acknowledge the motions judge's conclusion that the respondents could not have known that Turcotte would remain in the parking lot. That may well go to the issue of whether Turcotte was contributorily negligent, but it would not relieve the respondents from responsibility if their actions put him in danger that could reasonably have been avoided.

[63] The motions judge's conclusions with respect to the standard of care meant that she did not proceed to a causation analysis. I disagree with the respondents' submission that the motions judge's comments at paras. 96-97, referred to above, were directed to causation. In my view, she was clearly addressing foreseeability and the standard of care. Had the standard of care analysis been approached and applied properly, a causation analysis might well have determined that Turcotte would not have been injured "but for" the respondents' negligence, notwithstanding his own contributory negligence.

F. DISPOSITION

[64] For these reasons, I would allow the appeal and remit the matter to the Superior Court for determination in accordance with r. 20.05.

[65] While the motions judge said that she accepted the evidence most favourable to the appellants, she never precisely articulated what evidence that was. Nor did she resolve inconsistencies in the evidence. We do not know the factual underpinnings of her analysis. For these reasons, a trial is necessary. The judge trying the matter shall be entitled to give pre-trial directions pursuant to rr. 20.05(1) and (2) to ensure the just, expeditious and efficient determination of the proceeding on its merits.

[66] Costs to the appellants in the amount of $7,500, inclusive of disbursements and all applicable taxes.

Released: gs. APR 13 2018

Gary R. Doherty C.J.O.

I agree [illegible] J.A.

[illegible] J.A.