

CANADA / JUDGMENT

A.D. v. Tadros

2005 BCSC 156

COURT

Supreme Court of British Columbia

DECIDED

14 February 2005

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2005 BCSC 156 Demontigny v. Tadros IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Demontigny v. Tadros 2005 BCSC 156 Date: 20050214 Docket: S023534 Registry: Vancouver Between: Amanda Demontigny Plaintiff And: Emad Tadros Defendant Before: The Honourable Mr. Justice Fraser Reasons for Judgment Counsel for the Plaintiff Dana C. Neilson Counsel for the Defendant Arthur Vertlieb, Q.C. Place of Hearing: Vancouver, B.C.

- [1] The defendant, Emad Tadros, applies for an extension of time to file a Jury Notice. Whether I can do so depends on the extent to which I am bound by decisions of other Judges of this Court. THE ALLEGATIONS OF THE PLAINTIFF
- [2] The plaintiff, Amanda Demontigny, claims damages from Mr. Tadros for an alleged sexual assault which she says occurred at the Empress Hotel in June 2001. She was an employee of the hotel and Mr. Tadros was a guest. He was there on business, for his employers. Mr. Vertlieb, for Mr. Tadros, says that, at its highest and most serious, the claim of Ms. Demontigny has to do with a brief, unwanted embrace while she and Mr. Tadros were fully clothed. Wherever the truth lies as to the incident, we do know that she is advancing a large claim against Mr. Tadros, on the basis that she suffered emotional injury and has required and will require extensive treatment and that she has been rendered incapable of employment ever since and for the foreseeable future.
- [3] Best Foods Food Service Canada and UL Canada Inc., Mr. Tadros' former employers, were but are no longer defendants, so Mr. Tadros is on his own.
- [4] As I understand it, Ms. Demontigny has received substantial benefits from the Workers Compensation Board as a result of her claim. This action is in fact brought by the Board as a subrogated claim. Of course, any damages awarded over and above the benefits provided to Ms. Demontigny by the Board would be paid to her. THE PROCEDURAL HISTORY
- [5] Mr. Tadros was represented previously by solicitors other than his present solicitors, who were retained by his employers. When Notice of Trial was delivered by the solicitors for the plaintiff to the defendant's previous solicitors, no step was taken by the latter to deliver a Jury Notice.

- [6] It is undisputed that his previous solicitors never told Mr. Tadros that he could opt for the trial to be heard by a Court composed of a Judge and jury and that he was not aware of that option during the period in which a Jury Notice could have been delivered.
- [7] The unspoken but unmistakable implication of Mr. Vertlieb's submissions is that Mr. Tadros' previous solicitors were negligent in not delivering a Jury Notice, or at least in not telling Mr. Tadros of his option to have this done.
- [8] About four weeks before the original trial date of 15th November 2004, Mr. Tadros made the same application he makes today. The application was dismissed by Macaulay J., on the ground that extending the time would cause prejudice to the plaintiff. The prejudice he identified was that postponement of the trial could be seriously detrimental to the plaintiff's health. [1]
- [9] After that ruling, the trial was adjourned by R. Holmes J., on the ground that the estimated length of trial was too low. No new trial date has been fixed. DISCUSSION
- [10] Mr. Vertlieb contends that because an order by me extending the time would not prejudice the plaintiff, it is open to me to re-visit the matter. I agree, so far as prejudice is concerned.
- [11] However, there is another obstacle to the application. In *Ngai v. Cho*, another case involving solicitor negligence, Neilson J. held: [I]t is not enough for the plaintiff to establish that his solicitor was negligent, and that the other parties have suffered no prejudice from the late delivery of the notice. He must also prove either that he wished or intended to elect a jury trial during the 21-day period following delivery of the Notice of Trial. ...[2]
- [12] Cited to Neilson J. were two cases from the Court of Appeal. In *Smith Estate v. Vancouver General Hospital*[3], the solicitor for the plaintiffs admitted that he or she "failed to consider" the option of a jury trial. The Court held that the failure to elect was caused by his or her negligence and that, therefore, the plaintiffs should not be deprived of a jury trial: In summary, this is a case where by reason of the negligence of the solicitor for the plaintiffs the plaintiffs failed to elect for trial by judge and jury within the time prescribed by the rules. In such cases, where there has been no prejudice to the opposing parties (as here) the authorities indicate that an extension of time will be granted.[4]
- [13] The later decision of *Hoare v. Firestone Canada Inc.*[5] was one in which solicitor's negligence was not involved. It was simply a case in which the plaintiff did not, after the issuance of the first Notice of Trial, elect for a jury trial. After the trial was adjourned, the plaintiff issued a Notice of Trial for the second trial date and also delivered a Jury Notice. The Court held that the plaintiff's opportunity to opt for a jury trial was limited to the period following the issuance of the first Notice of Trial. The Court said: [O]n a broad consideration of the rules and authorities which has been made possible in these appeal proceedings, I have concluded that the election is intended to be made once only, at a particular stage, and for good reason. If the trial may be before judge and jury, rather than judge alone, that is generally an important consideration for both parties in preparation of the case and

perhaps, indeed, in the selection of counsel.[6] The Court went on to say that a party seeking to elect for jury trial after expiry of the period limited by the Rules must satisfy the Court either that the wish, or intention, to do so existed during the period so limited or that it was prompted in fact by a fundamental change in circumstances.[7]

- [14] It is apparent from the Reasons of Neilson J. in *Ngai* that she synthesized the reasoning of these two decisions of the Court of Appeal, that is, she held that, in a case involving the failure of counsel, through negligence, to deliver a Jury Notice, a party applying for an extension of time to do so must show, in addition to the negligent failure of counsel, an intention to elect for a jury trial during the period in which the party is entitled to do so after delivery of the Notice of Trial. In a nutshell, Neilson J. engrafted onto Smith the rationale of *Hoare*. In the absence of evidence of such an intention, she dismissed the application to extend time.
- [15] Leave to appeal her decision was denied by Saunders J.A.[8]
- [16] In the earlier application in the case before me, Macaulay J. held: Mr. Tadros cannot show that he had any wish or intention to seek a trial by jury during this period because he did not know of his right to do so.[9] ... In my view, I am bound to follow the reasoning of Neilson J. [10]
- [17] The issue of precedent surfaces in two different ways.
- [18] I conclude that it was argued to Macaulay J. that it was open to him to distinguish *Ngai*. The contention would have been that because there is affirmative evidence demonstrating that Mr. Tadros had had no opportunity to make a decision one way or the other, his situation differs from that of the plaintiff in *Ngai*, where there was no such evidence.
- [19] The responsive contention would have been that the difference only goes to the reason that Mr. Tadros did not form an intention and that, in functional terms, the situation in the two cases was the same: the applicant could not show that he formed the intention to seek a jury trial during the requisite time limit.
- [20] It is implicit in the Reasons of Macaulay J. that he saw no distinction between *Ngai* and this case.
- [21] Had these contentions been put before me as ones of first impression, I would have had to consider whether Mr. Tadros' lack of knowledge made a difference. But it is not a matter of first impression: Macaulay J. has already held that the ignorance of Mr. Tadros does not help him. It would have been inappropriate for me to revisit the argument, because the Reasons of Macaulay J. are the considered Reasons of a Judge of this Court, as described in the famous decision of Wilson J. in *Re Hansard Spruce Mills Ltd.*[11]
- [22] Could it have been argued to Macaulay J. that Neilson J. was wrong, that she had misinterpreted *Smith Estate* and *Hoare*? Again, I think not and again, I refer to *Re Hansard Spruce Mills Ltd.*

- [23] The reason I may seem to be belabouring the obvious is that I am aware that some Judges of this Court consider themselves free to refuse to follow Reasons for Judgment of a colleague on this Court on the basis that those Reasons wrongly interpret earlier authority from a higher Court. Examples may be found in the Law Reports. I hope it is clear from these Reasons that I consider this stance to be impermissible.
- [24] Litigants in this Court should not encounter different views among its Judges as to precedent. That might lead to different outcomes in any one case, depending on the Judge who hears the matter. That would be subversive of the root premise of the idea of precedent, itself.
- [25] The upshot is this:
- (i) I am bound by the decision of Macaulay J. that the case at bar and Ngai cannot be distinguished. (ii) Macaulay J. was bound by the reasoning of Neilson J. in Ngai. (iii) I am bound by the decision of Macaulay J. that he was bound by the decision of Neilson J. The necessary result is that the application must be dismissed. SUMMARY
- [26] The application is dismissed. "G.P. Fraser, J." The Honourable Mr. Justice G.P. Fraser
- [1] 2004 BCSC 1379, para. 24.
- [2] 2001 BCSC 333, para. 23.
- [3] (1981), 28 B.C.L.R. 282 (B.C.C.A.)
- [4] para. 20
- [5] (1989), 42 B.C.L.R. (2d) 237 (B.C.C.A.)
- [6] at p. 459
- [7] at p. 459-460. A fundamental change in circumstances is not alleged by Mr. Tadros.
- [8] CA 028451, Vancouver, 20010612.
- [9] para. 22.
- [10] para. 26.
- [11] (1954), 13 W.W.R. (N.S.) 285 (B.C.S.C.).

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