

CANADA / JUDGMENT

Abdi v. Bottomley

2018 BCSC 2332

COURT

Supreme Court of British Columbia

DECIDED

20 June 2018

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2018 BCSC 2332 Abdi v. Bottomley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Abdi v. Bottomley,

2018 BCSC 2332

Date: 20180620

Docket: S147738

Registry: Vancouver

Between:

Alla Abdi

Plaintiff

And:

Paul Bottomley, Roberta Bottomley, and City of Burnaby

Defendants

And:

Paul Bottomley and Roberta Bottomley

Third Parties

Before: The Honourable Madam Justice Gropper

Oral Ruling re Mitigation and Contributory Negligence Issues put before the Jury

Counsel for the Plaintiff:

J.S. Stanley

P.J. Bosco

Counsel for the Defendants and Third Parties Paul and Roberta Bottomley:

M.D. Murphy

Counsel for the Defendant City of Burnaby:

D.J.A. Bell

S. L. Hamilton

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 20, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 20, 2018

- [1] THE COURT: The defendants seek to have the issues of mitigation and contributory negligence put before the jury. The plaintiff opposes this.
- [2] Whether there is any evidence on a given issue is a matter of law and thus within the sphere of responsibility and power of the trial judge to determine. Where the court concludes, as a matter of law, that there is no evidence to support an allegation, the issue ought to be taken away from the jury's consideration.
- [3] Earlier jurisprudence addressed this, where, after the jury had rendered their verdict, the trial judge refused to give effect to aspects of the jury's verdict where the trial judge determined that there was no evidence to support the findings of the jury. Contemporary jurisprudence suggests a preferable course of action is for the trial judge to determine whether the issue should be properly placed before the jury for its consideration.
- [4] In *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1121 Mr. Justice Abrioux set out the principles of what issues and questions ought to be left before a jury at para. 11:
- [11] Insofar as contributory negligence and provocation are concerned, I have considered counsel's submissions within the context of the following principles:
 - (a) my task is to determine whether there is any evidence on which the jury, properly instructed and acting reasonably, could find for the plaintiff as against the defendants on the issues in question;

- (b) if there is direct evidence on an issue, I am not to weigh the evidence, but only to consider whether it meets the threshold of reasonableness such that the jury, properly instructed, could make the requisite finding;
- (c) in the case of elements of a cause of action supported solely by circumstantial evidence, I should engage in a limited weighing of the evidence to ensure that it is reasonably capable of bridging the inferential gap between the evidence proffered and the element to be proved;
- (d) the judge does not decide whether the jury will accept the evidence, but rather whether the inference that the party seeks in its favour could be drawn from the evidence adduced, if the jury chose to accept it;
- (e) it is for the judge to determine whether there is some evidence on each element of the cause of action required to be proved by the party; it is for the jury to determine whether that evidence is sufficient to justify a verdict for the party on that issue;
- (f) "mere speculation" does not constitute evidence which meets the standard of reasonableness; and
- (g) the test in terms of the threshold is a low one.

Mitigation

- [5] The test for failure to mitigate was summarized by Mr. Justice Preston in *Antoniali v. Massey*, 2008 BCSC 1085 at para. 31 as follows: (1) that a certain activity would have reduced or eliminated the effect of the injuries; (2) that a reasonable person in the plaintiff's circumstances would have followed such a program; (3) that the plaintiff unreasonably failed to follow such a program; and (4) the extent to which the plaintiff's damages would have been reduced if she had undertaken the activity.
- [6] The defendants assert that Ms. Abdi failed to mitigate her damages by not continuing to take medication and engage in counselling approximately two and a half years ago, and that by doing so, she failed to take reasonable steps to mitigate the loss that she suffered as a consequence of the accident. They refer to the evidence given by each of the physicians who conducted independent medical examinations of the plaintiff earlier this year that say that medication and counselling would likely improve her condition. Specifically, the defendants refer to the evidence of Dr. Ganesan, who was called as an expert witness by the City of Burnaby, who said that the plaintiff would have benefited by continuing the counselling and taking medication for depression and anxiety had that course of treatment not been disrupted.
- [7] The plaintiff agreed that she stopped counselling and taking medication two and a half years after the accident.

- [8] In respect of whether medication and counselling would have reduced or eliminated the effect of the injuries, the plaintiff says that the experts' reports are based on independent medical examinations and while they may suggest that medication and counselling will improve her condition in the future, all of the reports were issued in early 2018. The plaintiff says there is no evidence that her condition would have improved in the approximately six months between the issuance of the reports and the trial.
- [9] The plaintiff asserts that the experts were not treating physicians and could not make recommendations or treat the plaintiff. She says that the recommendations made by the experts do not provide evidence that taking medication and engaging in counselling would have reduced or eliminated the effect of the injuries.
- [10] The plaintiff points out that she devoted her energy to returning to work and mitigating her financial and emotional losses, and in doing so she has already mitigated the damages that she is claiming from the defendants.
- [11] Regarding whether a reasonable person in the plaintiff's circumstances would have taken medication or undergone counselling, the plaintiff says there is no evidence that she was aware of the recommendations made by the experts or that her treating doctors or caregivers made such recommendations. The plaintiff argues that there is no evidence that her actions were unreasonable. What she did not do needs to be measured against what she did do. She did see her family doctor. She underwent multiple surgeries. She took medication. She saw mental health professionals and made impressive and early efforts to return to work which all the experts agree was therapeutic for her.
- [12] In considering the matter of mitigation, the Court must examine the totality of her efforts.
- [13] The plaintiff says that there is no evidence that her damages would have been reduced if she had undertaken the medical recommendations between the issuance of the expert reports and the date of trial.
- [14] I consider that there is some evidence, particularly that of Dr. Ganesan, upon which a reasonable jury properly instructed could find that had the plaintiff continued to take medication and undergo counselling two and a half years ago, that her condition would have improved and that a reasonable person in the plaintiff's circumstances would have continued with medication and counselling. I find that the plaintiff unreasonably and abruptly stopped taking the medication and counselling, and that to some extent, her losses would have been reduced had she continued with medication and counselling.
- [15] The evidence goes beyond mere speculation and has an air of reality. The defence of mitigation will be put before the jury for its consideration.

Contributory negligence

- [16] For the issue of contributory negligence to be put to the jury, the defendants must tender reasonable evidence upon these two points: (1) the plaintiff demonstrated an absence of reasonable care by choosing to sit by the fire pit; and (2) her decision to sit by the fire caused or contributed to her loss.
- [17] The defendants refer to the evidence of Paul Bottomley that he poured oil on the fire on the evening of May 14, 2014, three times, and that Ms. Abdi and others were sitting around the fire when Mr. Bottomley poured oil on the fire a second time.
- [18] I note parenthetically that it was the third time that he poured oil on the fire that the explosion erupted and injured the plaintiff. Mr. Bottomley's daughter, Jacqueline Bottomley, said the same thing.
- [19] The defendants say that if the plaintiff's position is that fire and the existence of the wheel rim or fire pit is inherently dangerous, especially where there is someone reckless around it, then it was negligent of the plaintiff not to remove herself from the fire pit and the fire.
- [20] I have reviewed the evidence that is contained in my notes. There is no evidence that Ms. Abdi saw Mr. Bottomley put oil on the fire before the third time that caused the explosion. Even if she was present for the second pour, Paul and Jacqueline Bottomley resiled from their evidence that Ms. Abdi was there for the second pour in cross-examination. Neither of them could say that one of the girls present for the second pour was Ms. Abdi.
- [21] The defendants also refer to the camp fire at Cultus Lake that Ms. Abdi attended shortly before the May 14, 2014, incident, where Sidney Bottomley poured oil on the fire as Ms. Abdi and others were sitting or standing close by, within a couple of feet according to Sidney Bottomley's evidence.
- [22] If Ms. Abdi saw Sidney pour oil on the fire at Cultus Lake, which is not clear in the evidence, the situation was markedly different. Sidney Bottomley warned everyone present that he was putting oil on the fire. Whether Ms. Abdi saw him do that or whether she was close to the fire was not established in the evidence.
- [23] All of those who were present on May 14, 2014, who gave evidence, including the Bottomleys, who knew that oil would be poured on the fire, did not perceive it to be dangerous to be near the fire. Ms. Abdi and Ms. Shokrollah gave evidence that they were seated at the fire for just a few minutes before Mr. Bottomley poured the oil onto it. They both perceived immediately that it was dangerous. Ms. Abdi said she did not have time to react before the explosion took place. Neither Ms. Abdi or Ms. Shokrollah were aware of what Mr. Bottomley was doing. Mr. Bottomley issued no warnings before he poured oil on the fire.

[24] I find that there is no evidence upon which a jury properly instructed and acting reasonably could find for the defendants against the plaintiff on the issue of contributory negligence. It is mere speculation, even on the low threshold required. There is no evidence that the plaintiff demonstrated an absence of reasonable care by choosing to sit by the fire pit. The defendants must provide evidence in respect of both parts of the test of mitigation.

[25] As I have found that there is no evidence to support the first aspect, therefore the defence of contributory negligence cannot be put to the jury for its consideration.

"Gropper J."

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