

CANADA / JUDGMENT

## Adamthwaite v. British Columbia

2022 BCSC 2460

COURT

Supreme Court of British Columbia

DECIDED

16 June 2022

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2022 BCSC 2460 Adamthwaite v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Adamthwaite v. British Columbia,

2022 BCSC 2460

Date: 20220616

Docket: S-196970

Registry: Vancouver

Between:

Danika Tracy Eileen Adamthwaite

Plaintiff

And

His Majesty the King in Right of the Province of British Columbia,

The Corporation of the District of West Vancouver,

North Shore Lifeboat Society and West Vancouver Marine Rescue Society

Defendants

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing by videoconference:

P. Khurana

Counsel for the Defendant The Corporation of the District of West Vancouver appearing by videoconference:

B.P. Piva

No other appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 16, 2022

Place and Date of Judgment:

Vancouver, B.C.

### June 16, 2022

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The application before the court today is brought by the Corporation of the District of West Vancouver (the "District") for leave to file a third party notice as against already named third parties and new defendants, who fall into three categories:
- a) parties that are alleged to have been under a contract for the maintenance or repair of the property where the subject slip and fall or trip and fall occurred, that being North Shore Lifeboat Society, West Vancouver Marine Rescue Society and Royal Canadian Marine Search and Rescue Inc. (the "Pier Maintenance Parties");
  - b) operators of water taxis that use the pier, that being Mercury Transport and Cormorant Enterprises Ltd., dba Cormorant Marine (the "Water Taxi Parties"); and
  - c) defendants in an action brought by the plaintiff arising from a motor vehicle accident that occurred in 2011 the claims for which were subsequently settled in August 2017 with a full and final release, including an acknowledgment that no proceedings would be taken to seek contribution or indemnity, that being Thomas W. McClure and Sarah Louise Brown (the "MVA Parties"). Notably, that settlement was one week before the subject slip and fall, which occurred on August 18, 2017.
- [3] The requested third parties have been served. None of them are here or taking a position with respect to this application. The only party taking a position is the plaintiff.

[4] The plaintiff takes the position that, with respect to the MVA Parties there is no merit to the claims against them, and with respect to the Water Taxi Parties and Pier Maintenance Parties, that there has been undue delay in bringing this application, these being some of the factors for consideration on applications such as this, as set out and confirmed in *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at paras. 16 and 17:

- a) prejudice to the parties;
- b) expiration of limitation period;
- c) the merits of the proposed claim;
- d) any delay in proceedings; and
- e) the timeliness of the application.

[5] While these five factors should be considered, ultimately the decision is one of discretion of the court, and one that has regard to the interests of justice in ensuring that fair trials are undertaken, whereby the issues in dispute between the parties can be determined, which often does come down to the final question of prejudice.

### **Timeliness and delay: The Water Taxi Parties and Pier Maintenance Parties**

[6] As to the delay and timeliness of the application being brought specifically insofar as it relates to the Water Taxi Parties and the Pier Maintenance Parties, on September 25, 2017 notice was given by the plaintiff to the District that the plaintiff's fall occurred as she was disembarking a water taxi. The plaintiff argues that nothing was done after that time by the District to investigate who the Water Taxi Parties were, noting that a simple Google search would have revealed their identifies.

[7] The District provides no explanation why it has taken some four years for this application to be brought. Certainly, the defendant would be in a position to know who was operating the water taxis on the pier under its overall interest as the municipality, and although the plaintiff did not argue this, I would expect, as the party issuing business licences for their operations.

[8] It was not until January 25, 2021, that counsel to the District responded to the notice letter, when they emailed to ask the plaintiff to identify the water taxis operating on the pier, and seeking that any information in that respect be included in the list of documents.

[9] We are now close to a year and a half since that email was sent and, as stated, nothing has been done further in that respect.

[10] With respect to the Pier Maintenance Parties, again this is an entity that the District ought to have known existed well before now, and the plaintiff argues that as such there has been a delay in seeking to now third party them in.

**Merits: MVA Parties**

- [11] With respect to the MVA Parties, the issue as to a prior motor vehicle accident which was settled one week prior to this incident seems to have only come up relatively recently in terms of knowledge of relevance to this proceeding. I do not see delay as being a factor for consideration with respect to those parties.
- [12] Rather, with respect to the MVA Parties, the main argument in opposition of the third party claims being proposed against them is as to the merits.
- [13] The parties both argued as to the impact and merits of apportionment of damage claim for injuries with prior accidents, including with respect to injuries that are indivisible.
- [14] On the one hand, the plaintiff argues, and references a report from Dr. Chu, in which it is confirmed that sometime in 2018, there was an exacerbation of low back pain. While there is a new injury as a result of this slip and fall, namely to the hip, the medical evidence supports that there is claim for an exacerbation of this earlier injury.
- [15] The District argues that based on that medical evidence they may be entitled to claim contribution and indemnity, relying on *Bradley v. Groves*, 2010 BCCA 361 ("Bradley") at paras. 32 to 34, and the well-known decision of *British Columbia Ferry Corp. v. T & N*, 1995 CanLII 1810, a decision of the B.C. Court of Appeal, which specifically addressed the issues that may arise with to seeking contribution where there has been a waiver as a result of a settlement against certain parties.
- [16] That issue was further considered in *Owners, Strata Plan KAS3204 v. Navigator Development*, 2020 BCSC 1954, where at paras. 26 to 35 the court summarize the law as to the right to claim contribution from a released party.
- [17] In contrast, the plaintiff points to various authorities where despite there being an overlap in injury and damage claims, the court has been able to apportion damages, such as:
- a) *Ashcroft v. Dhaliwal*, 2008 BCCA 352, where the court commented that while there was overlapping damages, they arose from completely different events such that there is no concurrent injury which would engage s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333 and the Bradley considerations.
  - b) *Sandhu v. Vuong*, 2016 BCSC 1490 ("Sandhu"), where there had been a second, albeit resolved, claim that had been brought under the Manitoba Workers' Compensation legislation in which there is a specific statutory provision by which no further actions can be taken for contribution or indemnity if such a claim is made and satisfied. The plaintiff argues that that statutory limitation is akin to the release that was given by the plaintiff in the case at bar.

- [18] Counsel for the plaintiff also argues, although I am paraphrasing, that the floodgates that could be opened if parties were enabled to bring third party claims against long-settled cases, which in this case is some 11-year-old accident claims settled some five years ago in this matter when clearly, it is not a concurrent incident.
- [19] Further, with respect to the MVA Parties, the plaintiff argues that there is no prejudice in not allowing the third party notice to be filed because the defendant will still be able to argue pre-existing injury and their defences will remain intact.
- [20] In response to that, or perhaps not directly in response to that argument, the defendant argues that in this case, the plaintiff has not indicated at this time that her claim for injuries will be limited to only those which directly arose from this incident.

### Other Factors Generally

- [21] Turning then to the remaining factors for consideration, I will briefly comment on them.
- [22] I am satisfied that the expiry of the limitation period is not a factor for any of the groups of proposed third parties. There was no dispute raised as to their being some merit, the threshold being low, to the claims in respect of the Pier Maintenance Parties or the Water Taxi Parties.
- [23] As such, the final specific factor for consideration is the prejudice to the parties.
- [24] The plaintiff argues that there is potential prejudice to her position, in that a trial date which notably was set down after this notice of application was filed with the notice of trial being recently filed to secure a 10-day trial in December of 2024, some 18 months away.
- [25] The concern from the plaintiff's perspective is that by allowing these filings, there is a possibility that that trial date will be jeopardized. It is speculative at this point, however, because counsel has not been appointed, although it does sound like some of these parties have in fact engaged counsel already, but they are not on record as of yet, so their calendars have not yet been canvassed, and it is not known if this will present a conflict or not.
- [26] The defendant, in contrast, argues that if an ability to claim contribution and indemnity from third parties is lost, they will suffer the obvious prejudice and, to quote Mr. Justice Burnyeat in the Sandhu, after considering the intended effect of Bradley, although I am paraphrasing slightly, there could be a significant injustice if a tortfeasor was essentially forced to pay damages that were not caused by him or her.

### Conclusion and Summary

- [27] Based upon the above considerations I am satisfied that, in balancing the overall timeliness and delay in bringing this application, the merits of the claims, prejudice and overall interests of justice, that it is appropriate to add as third parties the Pier Maintenance Parties and the Water Taxi Parties.

- [28] I am not satisfied that there is that there is a significant risk of losing the trial date. To the extent documents discovery and examinations for discovery have not been done, there remains 8 months between now and then. There is no reason why discoveries on a matter of this nature cannot be completed in time, or that counsel can be retained who is available for those court dates. With respect to the delay, while I do have concern with the timeliness of the application, the overall balancing of prejudice, including of they type mentioned in Sandhu, weighs in favour of granting the relief sought, notwithstanding the delay, particularly given that discoveries have not yet concluded notwithstanding that delay.
- [29] As such, I grant the relief with respect to North Shore Lifeboat Society, West Vancouver Marine Rescue Society, the Royal Canadian Marine Search and Rescue Inc., Mercury Transport Inc., Cormorant Enterprises Ltd. doing business as Cormorant Marine.
- [30] With respect to the MVA Parties, I am satisfied, based on the plaintiff's argument, balancing the prejudice to the defendant in not being able to seek indemnity directly from those parties, as against the prejudice to those parties being brought into litigation many years after they settled their claims, does not weigh in favour of granting the application, particularly given the merits of doing so given the settlement and ability of the court to apportion damages to take into account any pre-existing injuries for which similar injuries are sought to be compensated. I dismiss the application in respect of the MVA Parties.
- [31] Given that there was divided success, each party will bear their own costs.
- [32] So that leaves you, Mr. Piva, with having to do a little bit of a rewrite on the third party notice as it cannot be as set out in the schedule to the notice of application.
- [33] Given the urgency to this order, the order may be signed electronically and in counterpart, and it does not need to be included in the order, but Mr. Piva, you have my authority to indicate that I have said it can be entered on an urgent basis when you submit it to the registry for entry.
- [34] CNSL P. KHURANA: Thank you.
- [35] CNSL B. PIVA: Thank you, Your Honour.
- [36] THE COURT: Thank you.
- [37] CNSL P. KHURANA: Thank you.

"Master Robertson"

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