

CANADA / JUDGMENT

Barrie v. British Columbia

2020 BCSC 2272

COURT

Supreme Court of British Columbia

DECIDED

9 April 2020

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2020 BCSC 2272 Barrie v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barrie v. British Columbia ,

2020 BCSC 2272

Date: 20200409

Docket: S145732

Registry: Vancouver

Between:

Carol Barrie in her own right, as Personal Representative of

Andrew Barrie, deceased, and as Executrix of the

Estate of the said Andrew Barrie; Andrew Barrie Jr.

by his Litigation Guardian, Carol Barrie; Mary Barrie;

Craig Vallance; and Stuart Vallance

Plaintiffs

And

Her Majesty The Queen in Right of the Province Of British Columbia as represented by the Minister Of Forests, Lands and Natural Resource Operations, and as represented by the Minister of Jobs, Tourism and Skills Training; Destination BC Corporation; Regional District of Kootenay Boundary; City of Grand Forks; City of Christina Lake; Scott MacNeill; Kathy MacNeill; Jacqueline MacNeill; Jamie MacNeill; the Estate of Ron Legare, by his Personal Representative; the Estate of

Jacqueline Legare, by her Personal Representative; Government Entity #1; Government Entity #2; Government Entity #3; Government Entity #4; and Government Entity #5

Defendants

Before: The Honourable Mr. Justice Groves

in Chambers

Oral Reasons for Judgment

Counsel for the Plaintiffs appearing by teleconference:

D.K. Miura

R.W. Richardson

Counsel for the Defendant Her Majesty The Queen in Right of the Province of British Columbia appearing by teleconference:

M.J. Kleisinger

No other appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 9, 2020

- [1] THE COURT: By way of notice of application date-stamped February 25, 2020, the plaintiffs in this action requested two prayers for relief. The application was heard before me by telephone conference on Thursday, April 2, and judgment was reserved to today's date.
- [2] The two prayers for relief are, first and importantly, the request for a tort advance in this litigation in the amount of \$250,000. The second prayer for relief is set in the alternative and is a request related to costs in the event the respondent, Her Majesty The Queen in the Right of the Province of British Columbia (the "Province"), is successful on a pending appeal. That prayer for relief was not argued significantly before me, though it was referred to. I commented on the fact that I believed it was speculative and that, in fairness, I did not really allow argument on it.
- [3] The second prayer for relief, the alternative application, should be, and I direct, that it be adjourned generally.

- [4] This litigation has a long history. It is a family compensation action. It is a wrongful death action. It relates to the circumstances surrounding the death of Andrew Barrie in British Columbia on July 28, 2012, who was the spouse of the main plaintiff in this action, Carol Barrie. As of note, that is close to eight years ago.
- [5] On that date, the plaintiff Carol Barrie, her husband Andrew Barrie, and numerous other individuals set out on a tubing adventure on the Kettle River near Grand Forks. The Barries were from Scotland. They had never been to this area before. They were in the Grand Forks area with their friends the MacNeills, who were from Alberta. The Barries and the MacNeills were visiting relatives of the MacNeills by the name of Legare who were Ms. MacNeill's parents and who appear to have resided in the Grand Forks area.
- [6] July 28, 2012 turned out to be a tragic day. As a result of the tubing activities on the Kettle River, the Legares were killed, as was Andrew Barrie. They were killed when their tubes entered into a crevasse and propelled them onto the very dangerous Cascade Falls. Cascade Falls is a rough and deadly waterway. The suggestion in the evidence is that if you enter into Cascade Falls, you die.
- [7] Before I get into the history of this litigation and the direct issue before me, it is important to set out the theory of liability against the Province and other defendants. The plaintiff confirmed to me during this application that their theory of liability against the Province was that the tubing activity that the Barries and others were engaged in on that fateful day started on land owned and controlled by the Province in a provincial park called Gilpin Grassland Provincial Park. They state that the tubers were encouraged in this activity, as were others, by the tourism strategy of the Province in the area which encouraged tubing along the Kettle River. They state that the Province was aware of the dangers of Cascade Falls.
- [8] For all intents and purpose, Cascade Falls is owned by the Province. Additionally, and despite this knowledge, the Province created no marking and no warning as to when it was appropriate to exit the Kettle River or risk being swallowed up by Cascade Falls. Additionally, all the land surrounding this activity, which as noted started in Gilpin Grassland Provincial Park, is owned by the Crown.
- [9] The tubers in the river leave the park at some point and continue through land which is perhaps unsurveyed Crown land, and of course the plaintiffs note that the Province, by virtue of the Water Act, owns the water on which this activity took place.
- [10] In regards to the other defendants, there are local government defendants, both the City of Grand Forks and the Regional District of Kootenay Boundary. The theory of liability against those local government entities is their encouragement of tourism through their tourism strategy despite, it is alleged, their knowledge in this area and their knowledge of the dangers associated with Cascade Falls. This is in part similar to liability initially alleged against the Province, but of course it is a different yet complementary tourism strategy absent any control that the Province has over land, over water, and ownership thereof.

- [11] The estate of the deceased Legares are also two defendants. They were locals who in theory should have known the dangers of Cascade Falls and should have warned the Barries. Additionally, the MacNeills are defendants. It is alleged that they encouraged the tubing. They were also aware of the dangers of Cascade Falls from previous year, or years of tubing on the same water.
- [12] I raise all of this to deal with the concern of the Province in their submissions. In opposing the application for the tort advance, the Province says, amongst other things, that there is a possibility of joint or several liability amongst the government defendants. That is, in my view, not a possibility. The only area in which there is a similar theory of liability relates to the encouragement of tourism. I note this appears to have been done through separate alleged methods of tourism engagement with different or defendant-unique knowledge of the dangers. There is, I conclude, no possibility of a joint or several liability problem.
- [13] The litigation history in this matter is a concern. As noted earlier, the death of Mr. Barrie occurred on July 28, 2012. The action was commenced in 2014, shortly before the expiry of the limitation period. The Province was not served for close to one year, being served in the summer of 2015. At that point, there had been a unilaterally-set trial date for 2016 and that trial was adjourned by agreement.
- [14] A second trial date was taken out in 2018. Prior to that, numerous problems began to develop in regards to the governmental defendants' collective disclosure of documents. It is perhaps better put, problems arose as a result of their failure to disclose documents. The 2018 trial was adjourned because of disclosure of documents problems and it was reset for April 2020.
- [15] I have conducted numerous case management conferences in regards to this case. Those case planning conferences, I should say, have for the most part focused on the lack of disclosure of documents by the Crown, though other issues have arisen.
- [16] The problem first became germane and real when plaintiffs' counsel were able to locate governmental documents, documents that did not appear on any governmental list of documents, by simple Google searches and the like. It was apparent to me on the face of it that these documents were clearly relevant to the plaintiffs' theory of liability.
- [17] There was an extensive back and forth about documents. There were numerous orders about documents. As a result of these orders, on two occasions a provincial representative swore affidavits confirming documents, an unusual requirement under the Supreme Court Civil Rules [Civil Rules]. This requirement or obligation is imposed generally only when the court becomes concerned about the lack of attention to an obligation of a party to disclose documents. The purpose of swearing a list of documents is to require the party to turn their mind as to the extent of their document search and production and place them on an obligation by making the sworn statement that they have in fact complied with their obligation.

- [18] Other jurisdictions require an affidavit confirming a list of documents as a matter of course. British Columbia does not. Judges and masters of this court will often make this order on application when they are satisfied that a party needs to be reminded of the significance of their obligation and needs to be reminded that consequences can flow from the failure of that obligation to disclose documents.
- [19] Despite these two occasions on which a representative of the Province swore an affidavit confirming documents, numerous documents were disclosed in the latter part of May and June 2019. In fact, this document disclosure comprised over 42,000 more documents. That is, 42,000 more documents after two affidavits had been sworn by the Province confirming that all documents had been disclosed.
- [20] On July 23 and August 15, 2019, I heard an application to strike the defence of the Province as a result of their failure to disclose and their subsequent late disclosure. With that application, there was a first application for a tort advance. The tort advance was not argued before me on July 23 or August 15. My reasons resulting from those two applications were rendered on January 6, 2020 indexed at 2020 BCSC 10.
- [21] I will not review those reasons at any length, save and except to say that as a result of my determination of the application, the statement of defence of the Province was struck. As noted earlier, there was an application for a tort advance, but that was not advanced by way of argument in July or August 2019. Despite that, I stated in my reasons on January 6, 2020, that I was not inclined to make a tort advance, it being the case, at least in my mind and clear on the record, that the trial was scheduled for April 2020, some three months later.
- [22] The Province appealed my decision of January 6, 2020. As a result of that appeal and with the plaintiffs' desire to ensure that the trial in April actually proceeded, the plaintiff, who was the respondent in the appeal, requested an expedited appeal. The Crown chose to oppose that application. The matter was referred by the registrar to a judge of the Court of Appeal who refused the application for an expedited appeal. This was in the latter part of January 2020. It has never been made clear to me what the basis was for the Crown's decision to oppose an expedited appeal.
- [23] In light of that decision to have the appeal proceed in the usual manner, on February 10, 2020, at another case planning conference, the Crown advanced an application to adjourn the trial set for April 2020. The basis of that was, of course, that the appeal needed to be heard prior to the trial. Plaintiffs' counsel, recognizing the circumstances that they were faced with, did not oppose the adjournment application on the understanding that they would be at liberty to apply for remedies consequential to the adjournment, including a tort advance, at a later date. The order to adjourn the trial on those terms was granted.

- [24] It now appears, in all the circumstances, that it is unlikely that this trial will be heard sometime before 2022. That date will be seven years after service upon the Crown and a full ten years after the date of Mr. Barrie's death. Consequential to the adjournment application, the plaintiff now applies for a tort advance.
- [25] Before I deal with the substance of that application, I would like to deal with two issues raised in the response of the Province, one of which was not significantly advanced, but one of which was at least subtly advanced.
- [26] The first of these relate to the Crown's suggestion that my reasons of January 6, 2020, respecting my comment about a tort advance, create an issue estoppel or that the application now for a tort advance is *res judicata*. I will repeat what I said earlier, that at the hearing leading up to the reasons of January 6, 2020, the issue of the tort advance was not really argued. Additionally, my reasons for pre-emptively rejecting a suggestion of a tort advance when I issued my reasons on January 6, 2020, was my reasonable expectation that the trial of this matter that was scheduled for April 2020 would proceed.
- [27] As the trial has not proceeded and as there has been a further application and a successful application to adjourn, the underlying circumstances have changed significantly.
- [28] The second issue relates to the suggestion in the materials by the Crown that somehow liability is still at issue. It is not. My reasons for January 6, 2020, and the subsequent court applications and orders filed after that related to my reasons, specifically the entering of judgment against the Crown, confirm that.
- [29] In this litigation and for the purpose of this application and the conduct of this litigation generally, my reasons of January 6, 2020, have determined that liability vis-à-vis the Province is no longer a live issue. I repeat here, as was noted in the response of the plaintiff, the language of the Court of Appeal in *Carter v. Canada (Attorney General)*, 2012 BCCA 336 at para. 8 reads as follows:
- [8] the general proposition that successful parties are entitled to what are referred to as "the fruits of their judgment"; that is, they are entitled to the benefit of the order under appeal unless, and until, it is set aside. ...This is consistent with another general proposition of law that an order is presumed to be correct unless and until it is set aside.
- [30] As such, my consideration of the issue of the tort advance is based on the proposition, the fact that as this application is being heard, liability against the Crown has been determined.
- [31] The law of tort advance or on the issue of tort advance appears to be the following. Previous cases of this court and the British Columbia Court of Appeal have confirmed that Rule 13-1(19) founds the basis of the court's jurisdiction to make a tort advance.
- [32] *Serban v. Casselman* (1995), 2 B.C.L.R. (3d) 316 (BCCA) confirms that under former Rule 1-12, such jurisdiction exists. Rule 1-12 is the precursor of Rule 13-1(19).

[33] Paragraph 9 in Serban is particularly germane to the circumstances before me:

[9] I think it clear that there is jurisdiction under Rule 1(12) and Rule 35(3) to impose terms in granting an adjournment but the term must be just in all of the circumstances. Since the Rules have the force of law I do not think it matters that the term imposed is one of substance but again I say it must be just. The real question on this appeal is whether an order that payments be made on account of damages prior to the assessment of damages is a just one. The question put in another way is whether it was a proper exercise of discretion to make the order. The appellant submits that if there is jurisdiction under the present rules to impose as a term of an order that the defendant pay advances to a plaintiff it is not just to do so in circumstances where the adjournment was brought about through no fault of the appellant.

[Emphasis in original]

[34] In Serban, there was also an application for an adjournment of trial which was the foundation of the application for a tort advance, as is the case here.

[35] The case of Wood Atkinson v. Murphy, 2011 BCSC 1766, and the words of Associate Chief Justice MacKenzie, as she then was, are on point and germane to my analysis of the law here. In considering the Serban decision, MacKenzie A.C.J. noted that the advance must be just in all of the circumstances, and a judge must be satisfied that there is no possibility the final assessment of damage would be less than the amount of the advance.

[36] Associate Chief Justice MacKenzie relies on Tieu v. Jaeger, 2003 BCSC 906, where Master Barber at para. 17 states as follows:

[17] With respect to the advance itself, I believe there are some cases where, when the plaintiff has applied for an adjournment an advance has been made, even though the adjournment is not due to any action on behalf of the defendant. If I am wrong in that regard, then the principle on which I view this is this; first of all, it is conceded that liability is not an issue. Secondly, it is conceded that in all probability the plaintiff will obtain a judgment for in excess of \$50,000. \$14,500 has been paid. In my view, I would order an advance of \$20,000 at this time, which is less than what the plaintiff is asking for, \$50,000, but the principle on which I do it is this: With liability not being in issue, the plaintiff should be put in funds at the earliest possible time. That is a reasonable thing for the plaintiff to ask for. The only thing that is stopping her from getting this money is not a determination of whether she is entitled to it, but as to how much. When it has been conceded that the sum of \$20,000 is probably going to be less than or at least one-half of what the future amount she will obtain of \$40,000 plus is, I can see no reason not to give her at least \$20,000 at this time. To keep her out of pocket means that, especially when need is shown, as it has been in her affidavit, would be a refusal of justice.

- [37] In Wood Atkinson, it is further noted that liability had been resolved and that it would be almost seven years from the date of the accident to the date of the trial, when an actual determination of the amount of damages would ultimately be determined. As noted here, it will be ten years in the case before me.
- [38] I note, as well, the general proposition that in order for the court to consider a tort advance as part and parcel of an adjournment application, in addition to a potential requirement that there has been a lengthy delay, it is necessary to establish on the evidence that there is some need or some valid reason for the advance.
- [39] I reviewed the affidavits of Carol Barrie filed in this application. She described circumstances which I consider to be hardship, circumstances that she has faced since the loss of her husband and the loss of his income to support their family. This loss has been for over seven years. I agree with the submissions of her counsel that that evidence before me is significant. I am also satisfied generally that she has had to struggle to maintain the assets owned by her and Mr. Barrie as part of their joint financial plan. I am satisfied additionally, not that it is germane to my decision, that the assets are in a jurisdiction where reciprocal enforcement of judgments regularly occur.
- [40] Further, a review of the actuary evidence in this family compensation claim suggests that a provable loss is well in excess of the amount of the tort advance request. I note as well, with interest, this submission of counsel for the plaintiff which was not disputed by counsel for the Province, that there exists contrary actuary evidence created or advanced or obtained by the Province, which has been disclosed to the plaintiff as part of litigation disclosure, but has not been put before the court in this application. That expert evidence, the plaintiff suggests and the Province did not dispute, apparently does not significantly differ from the numbers or the dollar figure advanced by the plaintiff. That dollar figure or those numbers suggest that the actuarial loss related to the loss of income from the deceased Andrew Barrie, as I read it, for a trial scheduled in 2020 is a loss in the neighbourhood of 600,000 British pounds, close to \$800,000 CDN.
- [41] Liability has been established. The Province is liable. The Province sought an adjournment of the trial and the plaintiff either reluctantly agreed or took no position. The source of both the 2020 adjournment and the 2018 adjournment is the conduct of the Province. Both relate to their failure to follow the Civil Rules in regards to disclosure of documents. The most recent adjournment relates primarily to a decision of the Province to oppose the plaintiffs' application for an expedited appeal so as to save the trial date for April 2020. All that means is that a trial will likely occur now in 2022.
- [42] I add here that, in my view, it is no benefit to the Province to argue now that the unforeseen circumstances of a worldwide pandemic somehow alleviates the Province's responsibility for the recent adjournment, because with this pandemic the trial would unfortunately have to have been adjourned in any event. That is not relevant to the consideration today. It arose after the adjournment was necessitated.

- [43] At the end of the day, I agree with counsel for the plaintiff that there is a substantial likelihood that the trial in this action will not be set or heard until 2022. As I have said, that will be ten years after the date of the loss for which the Province is liable. That will be seven years after the Crown has been served in this proceeding.
- [44] The actuarial evidence before me suggests a quantified loss well in excess of the requested tort advance. That being said, I agree with the Crown that a tort advance of \$250,000 is well outside the normal range of a tort advance which is designed to partially compensate a plaintiff for their provable loss and is designed to ensure that the costs associated with a delay in having the matter effectively resolved are not too onerous for an aggrieved plaintiff.
- [45] In all the circumstances, I am satisfied that the plaintiff has met the test for a tort advance. I am ordering a tort advance in the amount of \$150,000 to the plaintiff Carol Barrie.
- [46] The plaintiff has been successful in this application and they are entitled to their costs. The second request in the plaintiffs' notice of application, as noted earlier, is adjourned generally. As I have indicated, it was not seriously argued and it is at this point speculative.

"J.R. Groves J."

GROVES J.

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