

CANADA / JUDGMENT

Belknap v. Hicks

2020 BCSC 1971

COURT

Supreme Court of British Columbia

DECIDED

16 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1971 Belknap v. Hicks

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Belknap v. Hicks,

2020 BCSC 1971

Date: 20201116

Docket: S179002

Registry: Vancouver

Between:

Leona Belknap

Plaintiff

And

Dr. Tracy Eugene Hicks

Defendant

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff, appearing by teleconference:

D.J. Renaud

Counsel for the Defendant, appearing by teleconference:

M.G. Thomas

Place and Date of Hearing:

Vancouver, B.C.

November 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 16, 2020

- [1] THE COURT: This is an application by the defendant to strike out certain paragraphs of the notice of civil claim of the plaintiff.
- [2] The notice of application filed October 30, 2020 and its amendment filed November 3, 2020 seek to strike, pursuant to Rule 9-5(1) of the Supreme Court Civil Rules, paragraphs 5, 17(i), 34(a) and 34(b) of the amended notice of civil claim filed May 6, 2019. In addition, paragraphs 3 and 18 are sought to be struck on the basis that the parties who are the subject of those paragraphs have been discontinued against.

Background

- [3] This is a medical malpractice action. The plaintiff suffered a hip fracture in 2014, and the defendant performed an operation on that fracture. It is alleged that the type of operation and the subsequent care were negligent. In addition, the plaintiff seeks punitive damages.
- [4] There is a trial commencing November 23, 2020 for ten days. Hence, the urgency of my delivering these reasons today orally rather than perhaps thinking about them for some longer period and providing written reasons. I am quite satisfied, however, with my conclusions, and I have no hesitancy in delivering reasons today. Although they may be somewhat truncated, and I do reserve the right to edit them in ways that do not affect the result if they are ever sought to be published.

Analysis

- [5] Turning to the pleading itself. I will deal with the impugned paragraphs.
- [6] The first is paragraph 3 under Part 1, Statement of Facts. It specifically deals with the former defendants Fraser Health Authority and Langley Memorial Hospital. I do not think there is any issue about that. It should be struck.
- [7] The first controversial paragraph is paragraph 5, also under Part 1, Statement of Facts. It reads:

Beginning on or about June 17, 1978 Dr. Hicks was granted privileges as an Orthopedic Surgeon by [Fraser Health Authority] in respect to [Langley Memorial Hospital] and [Peace Arch Hospital]. Since, Dr. Hicks has frequently practiced with flagrant disregard for patient safety and well-being, as exemplified multiple times in previous litigation and in the care of Ms. Belknap.

- [8] The issue as described in submissions by the defendant, is that, as a general rule, prior negligence of a party is irrelevant to proof of subsequent negligence, relying on *Stiles v. Hatfield*, (2003) O.J. No. 2365 (S. Ct. J), an Ontario case. Further, an exception to this rule arises only where the prior acts are so strikingly similar that the similarity is not attributable to coincidence and where the evidence is so similar that it would tend to prove some fact essential to the plaintiff's case: *Stiles; Sinclair v. March*, 2000 BCSC 349; *Williams v. Wai-Ping*, 2005 CanLII 16602 (ON SC).
- [9] The plaintiff refers me to the reasons of Justice Ross in *Saed v. Wittenberg*, 2010 BCSC 910. In that case, Ross J. was dealing with pleadings, which are set out at para. 2 of her reasons.
- [10] Justice Ross then reviews the law in quite some detail, and she concludes at para. 15:
- [15] In the present case there is no particularity provided by which the court could conclude whether there was a sufficient degree of similarity. The pleading is very broad, encompassing founded and unfounded claims with no limitation with respect to the nature of the claim.
- [16] I have concluded that for all the reasons cited by the defendants in their submissions, the paragraphs at issue cannot stand in their present form. They do not conform to the requirements for pleading similar facts. There is no nexus to the procedure performed upon the plaintiff. In my view these deficiencies are not saved by the addition of a claim for punitive damages.
- [11] I note in particular paragraph 18(c) of the pleading at issue in *Saed*, which pled:
- 18(c) Failing to recognize, given the prior founded and unfounded complaints made against Wittenberg with respect to the dental college or legal proceedings undertaken in court formally or outside of the court process by prior patients, that Wittenberg was not qualified to advise the Plaintiff or perform any of the medical or surgical procedures he performed upon the Plaintiff.
- [12] Paragraph 18(c) and paragraph 12 of the pleading in *Saed* are very similar to the very general plea here.
- [13] In my view, the pleading here simply cannot stand. It is not sufficiently particular. It is not an appropriate similar-fact pleading. What I would do is strike the following from the second sentence of that paragraph 5: "Since,", "has frequently", and ", as exemplified multiple times in previous litigation and". Therefore, the remaining paragraph should read:

Dr. Hicks practised with flagrant disregard for patient safety and well-being in the care of Ms. Belknap.

[14] That, in my view, is an acceptable pleading and can stand.

[15] Turning to the next impugned pleading. It is paragraph 17(i). Paragraph 17 says:

Particulars of the negligence of Dr. Hicks is as follows:

[16] And then 17(i) reads:

engaging in a close is good enough approach to patient care, including but not limited to surgical technique, communications, charting, and adherence to hospital systems and protocols;

[17] In discussions with counsel for the plaintiff with respect to this plea, it was conceded that the wording creates a confusion and a vagueness that is unnecessary, and that the plea would more properly read that:

Dr. Hicks does not comply with accepted or standard approaches to patient care, including but not limited to surgical techniques, communications, charting and adherence to hospital systems and protocols.

[18] Therefore, the phrase "engaging in a close is good enough approach" is struck, and the paragraph is allowed to be amended as I have indicated.

[19] The next is paragraph 18. Again, this deals with a defendant that has been discontinued against. Therefore, paragraph 18 should be struck.

[20] The next issue deals with paragraphs that are under, Part 3, Legal Basis, general heading "Punitive Damages". The paragraph objected to is paragraph 34:

Conduct warranting an award of punitive, exemplary and/or aggravated damages include but are not limited to:

(a) the departure by Dr. Hicks from adherence to standards of care has not been deterred by multiple individual lawsuits, media attention, or his peers;

[21] In a proposed amendment that was particularized even further such that it would read:

(a) the departure by Dr. Hicks from adherence to standards of care had not been deterred by multiple individual lawsuits, media attention, his peers, practice reviews by the College of Physicians and Surgeons of British Columbia or scrutiny by hospital administration boards and/or privileged granting authorities.

[22] That particularization, although it makes clear that the reference to his peers includes disciplinary proceedings, in my view, is not of much help.

[23] Paragraph 34(b) under "Punitive Damages" refers to the Fraser Health Authority, and that claim, as I said, has been discontinued. Therefore, paragraph 34(b) will be struck.

[24] As to paragraph 34(a), the submission of the plaintiff is that it is not a similar-fact argument.

- [25] The plaintiff says she should have punitive damages not because of the course of the defendant's conduct with others, but because the defendant has had other actions brought against him. Counsel points out that evidence in prior actions or disciplinary procedures is often hidden or protected by settlement privilege and by s. 51 of the Evidence Act, R.S.B.C. 1996, c. 124 and s. 53 of the Health Professions Act, R.S.B.C 1996, c. 183.
- [26] The plaintiff argues, however, that the very existence of such proceedings should be admissible, that the defendant's prior experiences with lawsuits and disciplinary procedures should have taught him a lesson, but he has not learned that lesson and, as a result, he should be punished in this action by an award of punitive damages.
- [27] In addition, that the existence of such proceedings shows that compensatory judgments against the defendant have been ineffective and, hence, punitive damages are warranted.
- [28] The plaintiff submitted that *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, a Supreme Court of Canada decision, was authority for the proposition that prior acts not amounting to similar fact evidence could be a basis for punitive damages. Counsel for the plaintiff referred in particular to para. 69, where, towards the end of that paragraph, the court says:
- [69] The Ontario Law Reform Commission, *supra*, recommended that the "court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant" (p. 46).
- [29] That is the context of considering whether punitive damages were appropriate. If you review that paragraph in its total, however, the, "fact and adequacy of any prior penalty" refers to proceedings that arise out of substantially the same facts. It is not referring to earlier proceedings. It is not referring to the history in total of the defendant's experience with negligence lawsuits or disciplinary actions, as is sought here, but rather whether the defendant has been punished in another manner for the same actions.
- [30] The submission of the plaintiff is that:

It follows that the inadequate impact of prior proceedings on the defendant's behaviour should heighten the court's scrutiny of the impugned conduct in this action. The systems in place are not perfect, and there will always be outliers. Occasionally it will fall to the courts to engage the mechanism of punitive damages.

- [31] I am satisfied that the plaintiff's position is based on a misreading of *Whiten* that prior acts not amounting to similar facts are admissible in support of a punitive damages claim, and I do not agree with that position. The law requires that punitive damages be centred on actions with specific negative consequences for this plaintiff.
- [32] Counsel mentioned some such actions including repeatedly minimizing and ignoring the plaintiff's concerns following surgery. Those actions could have been pleaded as particulars going to punitive damages, but they have not been.

[33] For prior cases to be relevant, there must be something upon which the court could decide there was a sufficient degree of similarity. Here, there is no such foundation. The simple fact of other actions and disciplinary matters, in my view, cannot be relevant. Thus, paragraph 34(a) of the amended notice of civil claim is struck.

[SUBMISSIONS]

Costs

[34] I am satisfied that the defendant should have his costs in the cause, unless there is something I do not know about costs. That is agreeable? All right. The defendant will have his costs in the cause, then. Thank you both.

"Master Muir"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/19/2020BCSC1971.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/belknap-v-hicks-2020>

Prepared on 26 October 2026 · Esheria