

CANADA / JUDGMENT

Brandt v. Volkswagen Group Canada Inc.

2015 BCSC 923

COURT

Supreme Court of British Columbia

DECIDED

12 March 2015

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2015 BCSC 923 Brandt v. Volkswagen Group Canada Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Brandt v. Volkswagen Group Canada Inc., 2015 BCSC 923 Date: 20150312 Docket: M116252 Registry: Vancouver Between: Jessica Sandra Brandt Plaintiff And Volkswagen Group Canada Inc., Volkswagen Aktiengesellschaft, NQ Enterprises Ltd., Citrus Nightclub, 298856 British Columbia Ltd., Brock Caissie and Township of Langley Defendants And NQ Enterprises Ltd., Citrus Nightclub, 298856 British Columbia Ltd., Brock Caissie and Township of Langley Third Parties

- and - Docket: M114772 Registry: Vancouver Between: Brock Caissie Plaintiff And Jessica Sandra Brandt, TheTownship of Langley, NQ Enterprises Ltd. doing business as Citrus Nightclub/Rock Sugar, 298856 British Columbia Ltd., Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5 John Doe #1, John Doe #2, John Doe #3, John Doe #4 and John Doe #5 Defendants And Insurance Corporation of British Columbia Third Party And Jessica Sandra Brandt, NQ Enterprises Ltd. doing business as Citrus Nightclub/Rock Sugar, 298856 British Columbia Ltd., Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5, John Doe #1, John Doe #2, John Doe #3, John Doe #4 and John Doe #5 Third Parties Before: The Honourable Mr. Justice G.C. Weatherill Oral Reasons for Judgment In Chambers Counsel for Jessica Brandt: T. Delaney Counsel for Brock Caissie: R. Parsons A. Geller Counsel for Township of Langley : J.K. Lamb Counsel for NQ Enterprises Ltd., Citrus Nightclub and 298856 British Columbia Ltd.: T. Newnham Counsel for Insurance Corporation of British Columbia: R.A. Deering Place and Date of Hearing: Vancouver, B.C. March 12, 2015 Place and Date of Judgment: Vancouver, B.C. March 12, 2015 I. background

- [1] THE COURT: The trial of this matter is looming, so I am going to give you my decision now.
- [2] These two related proceedings arise out of a motor vehicle accident that occurred on December 6, 2009, when a vehicle being driven by Jessica Brandt ("Brandt") and in which Brock Caissie ("Caissie") was a back seat passenger, left the road and struck a concrete barrier. Both Brandt and Caissie were injured in the collision.
- [3] These proceedings have been ordered to be tried together. The liability portion of the trials is scheduled to commence before me on April 13, 2015 for four weeks.

- [4] The applications before me today, in summary form, are as follows:
- a) an application by Brandt in the Brandt v. Volkswagen Group Canada Inc., Vancouver Registry M116252 action (the "Brandt action") to further amend her claim to plead that Caissie supplied alcohol to her and then encouraged or allowed her to operate the vehicle;
 - b) an application in both the Brandt action and the Caissie v. Brandt, Vancouver Registry M114772 action (the "Caissie action") by NQ Enterprises Ltd. and 298856 British Columbia Ltd., whom I will collectively refer to as the "nightclub defendants", granting leave to them to amend their respective responses to civil claim by adding further particulars of negligence against Caissie, alleging that he purchased and supplied alcohol to Brandt when she was a minor, failed to prevent Brandt from driving, and, indeed, encouraged her to drive a vehicle by riding with her as a passenger;
 - c) an application by the Township of Langley to amend or further amend its response to civil claim in each of the Brandt and the Caissie actions by adding a claim of negligence and breach of statutory duty by Caissie, alleging that he purchased and supplied alcohol to Brandt when she was a minor, failing to prevent Brandt from driving, and, indeed, encouraged her to drive a vehicle by riding with her as a passenger;
 - d) an application in the Brandt action by the Township of Langley for leave to file third party notices against the nightclub defendants and Caissie. The nightclub defendants have consented to this application in respect of the claim against them; and
 - e) an application by the Township of Langley in both actions for a certificate pursuant to the Subpoena (Interprovincial) Act, R.S.B.C. 1996 c. 442, requiring that one of the other passengers in the vehicle at the time of the accident, Cameron Haarsma, be required to attend as a witness at the trial.
- [5] Only Caissie opposes the applications to add claims or allegations of negligence and breach of statutory duty against him. However, his counsel conceded at the hearing this morning that he consents to all proposed amendments in the Caissie action, to the extent they amend pleadings that already allege contributory negligence against him.
- [6] No party opposed the Township of Langley's application under the Subpoena (Interprovincial) Act and, accordingly, that application was granted at the opening of this hearing. II. background
- [7] Caissie stated on his examination for discovery in July 2013 that he has no recollection of the accident or of the events leading up to it.
- [8] Brandt deposes that she was in a coma for a period of time after the accident and had no recollection of the accident or of the events leading up to it until May 27, 2014 when, during her examination for discovery, she was able to recall some of the events leading up to the accident.

- [9] She recalled that Caissie had purchased alcohol for her at a liquor store; that Caissie had invited her to his dorm room at Trinity Western University where they both consumed the alcohol that he had purchased; that she and Caissie then travelled to various nightclubs, and that Caissie told her he would and he did purchase alcohol for her in the nightclub.
- [10] In late 2014, counsel for Insurance Corporation of British Columbia ("ICBC"), a third party in the Caissie action, circulated to all counsel an amended response to civil claim seeking to add allegations that Caissie had negligently supplied Brandt with alcohol. All parties consented to those amendments, including Caissie. ICBC filed its amended response on February 12, 2015.
- [11] The allegations sought to be made against Caissie in the applications before me are, in all material respects, identical to those that are now raised by ICBC in its amended response to civil claim. III. discussion
- [12] The determination of whether to allow an amendment to pleadings is discretionary: *Letvad v. Fenwick*, 2000 BCCA 630 at para. 29.
- [13] Amendments to pleadings should be permitted as necessary to determine the real questions in issue between the parties using a "generous approach". Where a new cause of action is proposed, judicial discretion is wide with a view to the court determining what the interests of justice demand in the circumstances and to give effect to what is just and convenient to the parties: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 at para. 42 (C.A.) [*Teal Cedar Products*], *Chouinard v. O'Connor*, 2011 BCCA 161 at paras. 18 and 21 [*Chouinard*], as well as *Jones v. Lululemon Athletica Inc.*, 2008 BCSC 719 at para. 35 [*Jones*].
- [14] The following factors are to be considered in such applications:
- a) the delay in bringing the application;
 - b) the reason for the delay;
 - c) the expiry of a limitation period;
 - d) the connection between the existing claims and the proposed new cause of action; and
 - e) any prejudice to the parties. See: *Chouinard* and *Teal Cedar Products*.
- [15] Caissie submits that he ought not to be imputed with knowledge from ICBC's proposed amended response to civil claim that the proposed claims would be made against him because there is a difference between the allegation of contributory negligence being made by ICBC, where it is stated that Caissie breached a duty of care to his own safety and an allegation that he breached a duty of care for Brandt's safety.

- [16] Caissie says that he consented to the ICBC's proposed amendment because it merely further particularized the allegations of contributory negligence already pleaded by ICBC. It did not add any claim. During the hearing of these applications, counsel for Caissie made the same concession with respect to the responses to civil claim that had been filed by the Township of Langley and the nightclub defendants, to the extent that the amendments relate to allegations of contributory negligence already pleaded.
- [17] Caissie opposes today's applications on the basis that they allege a new cause of action against him for social host liability after the expiry of the applicable limitation period at a point in time when it will be impossible for him to properly defend the new claim. He says that he will be prejudiced if the amendments are allowed because the deadline for service of expert reports has passed and he has not served any reports from alcohol analysts or experts on the recovery of memory years after a head injury.
- [18] Caissie also submits that witnesses may have relocated or are otherwise unavailable at this point, employees of the involved establishments are likely to have moved on from their positions at the time of the accident, and the memories of witnesses whose evidence would be material to a defence against these allegations have likely continued to fade.
- [19] He says that the delay in bringing the applications to amend has prevented him from investigation or further investigation of the allegations and that the trial is now only one month away.
- [20] Caissie has not provided any specifics of these assertions. Potential prejudice is insufficient to preclude an amendment: *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145 at para. 43 (C.A.) as well as *Jones*.
- [21] Caissie argues that the amendments proposed by Brandt raise for the first time after the expiration of the applicable limitation period a claim against him of social host liability, and that the legal test in the social host liability claim is very much different from the legal test relating to the defence of contributory negligence.
- [22] The applicants submit that the limitation period was postponed because the role eventually played by Caissie was not discovered and could not reasonably have been discovered due to Brandt's head injury until she recovered her memory of the events of the night in question in or about May 2014.
- [23] The applicants say that there is a live issue as to whether the limitation period has, in fact, expired or whether it was postponed. They submit further that, regardless, the pleadings as they currently exist allege that Caissie's conduct was negligent. Indeed, the defendants have sought to apportion liability between all responsible persons pursuant to the Negligence Act, R.S.B.C. 1996 c. 333.

- [24] The applicants argue that Caissie's conduct has already been placed in issue. They say he has known since, at least, November of 2014, when ICBC circulated its amended third party notice, and when Mr. Delaney, counsel for Brandt sent him a letter advising that he intended to raise these new issues in his pleadings. They say that Caissie, accordingly, had ample notice that he would have to confront these very issues that the other parties now wished to plead against him.
- [25] In *KPMG v. IMO Industries (Canada) Inc.*, 2008 BCCA 317 [KPMG], the Court of Appeal dealt with a similar issue. This is in reference to the decision of Master Joyce in *Britco (Guardian ad litem of) v. Wooley* (1997), 15 CPC (4th) 255. At paras. 40 and 41 of KPMG, Justice Bauman, as he then was, stated as follows:
- [40] The learned Master dealt with a number of factual scenarios involving the possibility of an accrued limitation defence in respect of the new defendant.
- [41] With respect to scenario 3 the learned Master said (at para. 11): If the defendant alleges that there is an accrued limitation defence and the plaintiff denies that fact and the court cannot determine that issue on the interlocutory application, then the court should proceed by asking this question: assuming that there is a limitation defence, would it nonetheless be just and convenient to add the party even though by doing so the defence is taken away? If the answer to that question is yes then the order should be made. In that event it does not matter whether or not, in fact, a limitation period has expired because in either case it would be just and convenient to add the party and any limitation defence will be gone.
- [26] At paras. 47 and 48 of the same decision, Justice Bauman goes on to state:
- [47] Accordingly, I conclude that a chambers judge faced with an application to amend (which is otherwise proper), under Rule 24(1), and the possible expiration of a limitation period in respect of the cause of action raised in the new pleading in circumstances where it would be inappropriate to decide that issue summarily, should ask herself this question: Assuming that the limitation period has expired, in the exercise of my discretion under s. 4(4) of the Limitation Act would I nevertheless permit the amendment?
- [48] If the answer is "yes", the proposed amendment should be allowed, pursuant to the reasoning in *Brito*, supra.
- [27] After considering all of the evidence before me, including, that the two-year limitation period may not have expired; that Brandt was not able to recall the relevant events until her examination for discovery in May 2014; the explanation of the applicants for the delay thereafter in bringing their respective applications; the substantial connection between the existing claims and the proposed amendments; and the alleged prejudice raised by Caissie, it is my view that it is just and convenient that the amendments be allowed.

- [28] Accordingly, the answer to the question I am obliged to ask myself pursuant to the KPMG decision is yes. The amendments, in my view, are necessary to resolve the real issues between the parties, namely, whether Brandt was intoxicated at the time of the accident, whether Caissie contributed to her intoxication and her inability to safely operate a vehicle.
- [29] I do not agree that the amendments constitute a "fundamental shift in the nature of the actions," as submitted by counsel for Caissie. Brandt's level of intoxication has always been a live issue in these actions. I agree with Mr. Delaney that they particularize the proposed pleadings; particularize that Caissie played an active role in Brandt's alcohol consumption rather than a passive role. Indeed, both the nightclub defendants and the Township of Langley pleaded contributory negligence against Caissie from the outset and are merely seeking to further particularize those allegations. Moreover, in my view, any prejudice to Caissie can easily be remedied.
- [30] Accordingly, I am granting all applications to amend pleadings. I am also granting the Township of Langley leave to file its third party notices against Caissie and the nightclub defendants.
- [31] I am persuaded by and accept the arguments set out in Part 3 of the Township of Langley's notice of application filed on March 4, 2015.
- [32] Caissie submitted that, in the event the amendments were allowed, he should be entitled to conduct further examinations for discovery of each of Brandt and the nightclub defendants for a maximum of two hours each on or before April 3, 2015. He also submitted that he should be granted leave to commission and rely upon further expert evidence related to the issue of social host liability, including opinions from an alcohol analyst and experts on memory recovery, and that Brandt should be required to submit to a physical examination or examinations in order to facilitate those opinions.
- [33] Caissie was alive and should have been alive to a claim in negligence being made against him for supplying alcohol to Brandt while she was a minor when he received ICBC's proposed amendments to its response to civil claim in the fall of 2014. Indeed, it is likely that he was well aware of those allegations in July 2014 when the defendant, Volkswagen De Mexico, S.A. de C.V. circulated its pleadings in the third related action (Brandt v. Volkswagen De Mexico, S.A. de C.V., Vancouver Registry action S137244).
- [34] In my view, the argument that the claim against him was for contributory negligence in respect of his own safety rather than the negligence in respect of Brandt is, in this case, a distinction without a difference. I do, however, agree with counsel for Caissie that he ought to be entitled to conduct additional examinations for discovery on the issue raised in the new amendments. I am, therefore, ordering that Brandt make herself available for an additional examination for discovery by Caissie on or before April 3, 2015 for no more than two hours. I am not restricting the scope of that examination for discovery.

- [35] I am also ordering that a representative of the nightclub defendants make himself or herself available for an additional examination for discovery by Caissie on or before April 3, 2015, again for no more than two hours. I am cognizant of the submission in reply of Mr. Newnham, counsel for the nightclub defendants. However, Caissie's examination for discovery of the nightclub defendants took place prior to the revelations by Brandt in her discovery in May 2014.
- [36] I am also ordering that Caissie has leave to serve the report of an alcohol analyst on or before the beginning of trial, April 13, 2015. I am not making any order relating to an expert on memory recovery as, in my view, that application is no longer extant given my ruling in this case.
- [37] THE COURT: All right, ladies and gentlemen, is there anything else?
- [38] MR. DELANEY: Nothing from my perspective, My Lord.
- [39] THE COURT: Costs of the applications will be in the cause.
- [40] MR. DELANEY: In the causes.
- [41] THE COURT: In the causes. Quite right.
- [42] MR. DELANEY: Thank you, My Lord.
- [43] THE COURT: All right. Good luck. I will see you all on April 13 at ten o'clock, if not earlier. "G.C. Weatherill J."

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