

CANADA / JUDGMENT

Colson v. Vancouver Coastal Health

2012 BCSC 1193

COURT

Supreme Court of British Columbia

DECIDED

8 August 2012

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2012 BCSC 1193 Colson v. Vancouver Coastal Health IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Colson v. Vancouver Coastal Health, 2012 BCSC 1193 Date: 20120808 Docket: 11 2048 Registry: Victoria Between: Kevin Colson Plaintiff And Vancouver Coastal Health, Paul Clarkson, Anthony Salvian, Jay Beverley Adlington, Mark McConkey, Jane Doe No. 1, Jane Doe No. 2, Edward Gofton, Chris Durkin Defendants Before: The Honourable Mr. Justice Goepel Reasons for Judgment Counsel for the Plaintiff: G.T. Rhone Counsel for the Defendant, Edward Gofton: N.L. Fishman Place and Date of Hearing: Victoria, B.C. July 24, 2012 Place and Date of Judgment: Victoria, B.C. August 8, 2012

INTRODUCTION

- [1] This is a medical malpractice case that arises out of a surgery that was performed on July 16, 2009. The applicant, Dr. Edward Gofton, was the anaesthetist for the plaintiff's surgery which is the subject matter of the litigation.
- [2] The notice of civil claim was filed on May 18, 2011. By order dated May 10, 2012, the plaintiff added Dr. Gofton and a second anaesthesiologist, Dr. Chris Durkin, as defendants in this proceeding. It was a term of the order that any person added to the proceeding could apply to vary or discharge the order within 21 days after the date on which they were served. Dr. Gofton now applies to be removed as a defendant. POSITION OF THE PARTIES
- [3] Dr. Gofton notes that the two-year limitation period expired on July 16, 2011, approximately 10 months before he was added as a party. He submits that he is not a person who ought to have been joined as a party or whose participation in the proceeding is necessary to determine the existing litigation. He submits that the materials before the Court which form the basis of the application to join him as a defendant do not establish an issue between himself and another party relating to the relief, remedy or subject matter of the suit. He submits that the plaintiff's attempt to add him as a defendant in this proceeding is part of a shotgun approach to name the parties involved in the July 16, 2009 surgery without any consideration of their specific role in that surgery and whether they truly ought to be defendants. He relies on the decisions in *Forde v. Interior Health Authority*, 2007 BCSC 1706 ("Forde No. 1"), *Forde v. Interior Health Authority*, 2008 BCSC 1013 and *Jaholkowski v.*

Gascoyne (18 April 2012), Vancouver S092652 (B.C.S.C.).

- [4] Plaintiff's counsel advises that it was only after the action was commenced that he learned from an expert with whom he was consulting that negligence by the anaesthetists could have caused or contributed to the plaintiff's damage. Shortly thereafter he moved to join Drs. Gofton and Durkin. While the plaintiff acknowledges that Dr. Gofton was served outside the limitation period, he notes there is limited prejudice because the writ was served within one year of the expiry of that period: *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297. He says this case is distinguishable from the *Forde* decisions because the pleadings in this case set out the specific allegations made against Dr. Gofton. DISCUSSION
- [5] The foundation for the plaintiff's application to join a party is Rule 6-2(7). The relevant portions of the Rule are as follows: 6-2(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10), ...
- (b) order that a person be added or substituted as a party if
- (i) that person ought to have been joined as a party, or (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
- (i) any relief claimed in the proceeding, or (ii) the subject matter of the proceeding that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.
- [6] The wording of Rule 6-2(7) is substantially similar to its predecessor, Rule 15(5).
- [7] The authorities indicate that Rule 6-2(7)(b) is to be interpreted narrowly. The leading authority is *Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd.* (1979), 13 B.C.L.R. 293 (C.A.) ("*Enterprise*"). The circumstances where the rule applies were discussed in *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 16-18:
- [16] Whatever the exact meaning of the passage, it demonstrates in my view that the chambers judge erred in principle in failing to have regard to the fundamental limitation on subrule (ii) which is that it is intended only to remedy defects in the "proceeding" as it stood prior to the application to add parties. The source of the judge's error may be that in quoting subrule (ii) in her reasons, she omitted the words "... or whose participation in the proceeding is necessary to ensure that all matters in the proceeding ..." She made no reference in her reasons to the concept of necessity embodied in those words.
- [17] The leading authority on this rule is *Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd.* (1979), 13 B.C.L.R. 293 (C.A.), which settled the question whether the rule should be given a broad or a narrow construction. Lambert J.A. for the court held that the narrow construction must continue to prevail. In so doing, he applied the reasoning of Devlin J. (as

he then was) in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357. Lambert J.A. said at 298: I propose to turn first to the English cases. In *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357, [1956] 1 All E.R. 273, in a most thorough historical analysis of the jurisprudence, Devlin J. concluded that the first condition, "ought to have been joined", had its origin in common law, with its relatively simple remedies, and applied to cases such as joint contractors and that the second condition, "necessary that all matters in the proceeding be effectually adjudicated", had its origin in equity, with its more complex remedies, and that it covered cases where a remedy such as specific performance could not be awarded without additional parties being added to make the remedy effective. Devlin J. then traced the two lines of authority and decided that the narrow construction was to be preferred. He did so for what I consider to be five reasons. ... That passage illustrates the kind of issues which may be taken into account in deciding whether the application is within subrule (ii). The gist of the matter is that the plaintiff must establish either that the persons sought to be added "ought to have been joined as a party" or that their "participation in the proceeding is necessary" in order to permit the issues between the existing parties to be effectually adjudicated. Here, the issues to the point of the application were, as between the plaintiff and Dr. Finley, whether the latter had been negligent and, as between the plaintiff and the Hospital, whether it was vicariously liable for that negligence and perhaps for the negligence of others. Those issues could have been effectually adjudicated between the original parties.

- [18] That is not to say that if Drs. Fenwick and Evans had been joined as defendants at the outset, that would have been an improper joinder. But that is an entirely different question from that as to whether they ought to have been joined or whether their joinder was necessary in order for the issues between the original parties to be adjudicated upon. The chambers judge having erred in holding that subrule (ii) applied, no element of discretion arises. That finding must be set aside on the basis that there was no jurisdiction to add the parties under subrule (ii).
- [8] Different considerations apply with respect to Rule 6-2(7)(c). That rule was introduced in 1980 shortly after the Court of Appeal's decision in *Enterprise*. Rule 6-2(7)(c) allows the Court to join a party if it determines in the exercise of its discretion that it would be just and convenient to do so.
- [9] Rule 6-2(7)(c) contains a two-part test for the addition of parties. The first branch of the test will be met when a plaintiff can show that he has a possible cause of action against a proposed defendant. The threshold at this stage is low and the evidence is not to be analyzed: *Forde No. 1* at para. 13.

- [10] Dr. Gofton argues that the material before the Court does not establish an issue between Dr. Gofton and the plaintiff. He submits that the notice of civil claim applies a shotgun approach without any consideration to the specific roles played by the various parties in the surgery. He notes that the particulars set out in the amended notice of civil claim are identical for each of the defendants. There is no differentiation between the Health Authority, the anaesthesiologist, the resident anaesthesiologist and the surgeons involved in the operation.
- [11] Dr. Gofton relies on the comments in Forde No. 1 at para. 18 where Russell J. said:
- [18] It is impossible to discern on what basis each of the proposed defendants could be held liable in negligence. This is further complicated by the fact that affidavit evidence of some of the respondent physicians suggests that they had nothing to do with the plaintiff's care at the relevant time. Thus, I agree with the respondents that merely setting out a list of negligent actions that may or may not be applicable to each of the defendants on an individual level is so imprecise that it fails to give rise to a cause of action.
- [12] There is a major distinction between the pleadings in the Forde cases and the case at bar. In Forde, the particulars of negligence indicated that they applied to one, several or all of the defendants. That is not the situation in the case at bar. In this case, the pleadings specifically set out that the particulars of negligence apply to each of the defendants. Each defendant knows precisely what has been alleged against them. I find that the proposed pleadings are sufficient to establish a potential cause of action against Dr. Gofton.
- [13] Dr. Gofton's counsel conceded that if I found the pleadings sufficient, he could not seriously contend that it was not just and convenient to add Dr. Gofton as a defendant. That concession is well founded. The claim against Dr. Gofton arises out of the same surgery which gives rise to the claims against the other defendants. Dr. Gofton was joined shortly after the plaintiff became aware of a potential claim. The delay in joining Dr. Gofton is less than a year after the expiry of the limitation period. In all the circumstances it is just and convenient that the claim against Dr. Gofton continue in this proceeding.
- [14] I find that the joinder of Dr. Gofton is proper. His application to set aside the joinder is dismissed. Costs of the application will be in the cause. "R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

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