
CANADA / JUDGMENT

Commisso v. Teck Coal Limited

2018 BCSC 2283

COURT

Supreme Court of British Columbia

DECIDED

10 December 2018

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

2018 BCSC 2283 Commisso v. Teck Coal Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Commisso v. Teck Coal Limited,

2018 BCSC 2283

Date: 20181210

Docket: M159156

Registry: Vancouver

Between:

Pietro Commisso

Plaintiff

And

Teck Coal Limited

Defendant

Before: The Honourable Madam Justice Marzari

Oral Ruling Re Application for Summary Dismissal Trial

In Chambers

Counsel for the Plaintiff:

W.T. Rogers

Counsel for the Defendant:

B. De Vita, QC

L.M. Hanson

Place and Date of Hearing:

Vancouver, B.C.

November 23, 2018

Place and Date of Ruling:

Vancouver, B.C.

December 10, 2018

- [1] THE COURT: Mr. Pietro Commisso was injured driving home from his place of employment at Teck Coal Limited ("Teck Coal") on December 25, 2013, when his car ran off the road and rolled over. No other vehicle was involved and although the cause of the accident is not yet established, Mr. Commisso says that it occurred because he was ill. He further says that his employer knew or ought to have known that he was ill and that his ability to drive was compromised, and owed him a duty of care to ensure he had the ability to drive home safely or otherwise had a safe ride home. Mr. Commisso is claiming damages for extensive injuries, which he says have left him debilitated and unable to work.
- [2] Teck Coal brings this application for a summary trial seeking dismissal of the claim against it on two bases:
- a) that it owed no duty of care to Mr. Commisso; and
 - b) that the evidence indicates that Mr. Commisso would not have accepted an alternative ride home in any event, and therefore he cannot establish causation.
- [3] Mr. Commisso says that these issues are not amenable to disposition by summary trial on the basis that there are significant contradictions on key points in the evidence that go to the existence of a duty of care, and that he requires additional time to prepare the evidence he anticipates leading on all elements of the claim, including causation. Specifically, he has yet to interview the RCMP witnesses that attended the accident, or to prepare the reports that would be required to establish the cause of the accident. He himself has no recollection of the accident.
- [4] Alternatively he argues this court should find on the evidence in the summary trial that Teck Coal owed him a duty of care as alleged.
- [5] The trial is set to be heard 14 days commencing April 8, 2019 with a jury. This application was filed by Teck Coal on October 18, 2018, and responded to by Mr. Commisso on November 16, 2018. The summary trial was heard November 23, 2018.

Issues

- [6] The first question I must resolve on this application is whether the existence of a duty of care in this case is amenable to determination by way of summary trial. If so, I must consider whether or not Teck Coal owed Mr. Commisso a duty of care.
- [7] I will then address Teck Coal's second ground for dismissal of the claim on the narrow issue of whether Mr. Commisso would have accepted an alternative ride home if offered.
- [8] The burden of establishing the existence of a duty of care and causation is on Mr. Commisso, as is the burden of establishing that a determination of either question is not suitable for summary trial.

Discussion

- [9] The first issue to be determined is whether the issues raised by Teck Coal can or should proceed by way of summary trial.
- [10] Teck Coal says that this matter is amenable to summary trial because a determination that it owes no duty of care is essentially a matter of law and would be dispositive of the entire proceeding. It takes the same position with respect to the narrow causation issue it raises.
- [11] Mr. Commisso disagrees, and says that there are a number of contested facts that go to the existence of a duty of care and causation, and this makes the issues not suitable for summary trial. He also argues that he has not yet obtained and prepared all of the evidence essential to his case on these matters, including interviewing RCMP witnesses and obtaining expert reports, and that while this evidence will be ready in time for the trial in 4 months, it was not possible to obtain in time to respond to the summary trial application. Finally, Mr. Commisso says that the issues raised by Teck Coal should not be severed from the trial itself.
- [12] The critical question facing the court when hearing a summary trial application is whether the court can find the facts necessary to decide the disputed issues. Even where the court can find the necessary facts, it must still consider whether it would be unjust to decide the matter summarily by reference to factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of delay, the cost of taking the matter forward to a conventional trial, the course of the proceedings, and any other matters which arise for consideration: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 211 and 215; and *Gichuru v. Pallai*, 2013 BCCA 60, at paras. 30-31. A conflict in the evidence does not necessarily mean that a matter is not amenable to summary trial, however, and a court will try and resolve legal and factual issues where it is fair and just to do so: *Macmillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 22.

Duty of Care

[13] Teck Coal's position is that the duty of care asserted by Mr. Commisso is novel, in that there is no pre-existing recognized duty of care between an employer and employee where the employer did not cause or at least contribute to the risk that led to the employee's injuries. Furthermore it says there is no precedent that establishes a pre-existing or recognized duty of care in negligence upon an employer to ensure that its employees have the ability to drive home safely where an employee advises that they are not feeling well. It says such a duty would impose obligations on an employer where the harm is not reasonably foreseeable, and that reasonable foreseeability is independently required to determine proximity for the purposes of establishing a duty of care.

[14] In this regard, Teck Coal cited *Childs v. Desormeaux*, 2006 SCC 18, at para. 12; *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19; and *Jenkins v. Muir*, 2012 ABQB 352, at paras. 64-68. To these cases I would add the decision of the Ontario Court of Appeal in *John v. Flynn* (2001), 201 D.L.R. (4th) 500 (Ont. C.A.), application for leave to dismiss [2001] S.C.C.A. No. 394, wherein the Ontario Court of Appeal described an employer's duty of care to its employees at para. 26 as follows:

But the focus is on the workplace and in broad terms the duty of care to its employees does not extend beyond the workplace. The notion that an employer, operating a plant for the manufacture of truck and automobile parts, has a duty to monitor its employees to determine if it is safe for them to drive home is novel in the extreme.

[15] Furthermore, Teck Coal says that even if reasonable foreseeability could be established together with proximity, a general duty of care owed by all employers to all employees that report feeling unwell should be negated for policy reasons, as this would be a significant expansion of liability for all employers.

[16] Teck Coal generally accepts that an employer may owe a duty of care to its employees to ensure that the employee is safe to return home where the employer caused the impairment that led to the injury. Teck Coal also conceded that it may have a duty of care to offer or provide a safe ride home from the mine site in circumstances where it has knowledge that an employee is impaired in their ability to drive home. In this regard, Teck Coal agreed that it has a policy of arranging an alternate ride home for its employees when it has knowledge that an employee is unfit or unsafe to drive. Indeed Teck Coal had arranged such a ride for Mr. Commisso earlier in the year when the company was advised that he was feeling dizzy.

[17] However, Teck Coal says that mere knowledge that an employee is not feeling well is not enough to give rise to such a duty of care. They say that although Teck Coal knew that Mr. Commisso was unwell, it did not know or have any reason to believe that he was ill in a manner that impaired his ability to drive. While Teck Coal concedes that a duty of care may arise in the latter circumstance, they say no duty of care arises in the former.

- [18] Teck Coal's position that it owed Mr. Commisso no duty of care therefore turns on its factual assertion that even if Mr. Commisso was impaired as he alleges, Teck Coal had no knowledge of the extent of that alleged impairment on the evening of December 25, 2013. Teck Coal says that I can make that factual determination on the basis of evidence that they say is generally not in contention or is otherwise resolvable on the evidence in the summary trial.
- [19] This evidence includes that Mr. Commisso reported feeling unwell, but he was ready, willing and able to work by his own account and the accounts of others. Furthermore, Mr. Commisso's work involved driving large mining vehicles, including haulage trucks weighing 240 tons or more, and dump dozers weighing 40 to 50 tons. In examination for discovery Mr. Commisso agreed that he felt confident in his ability to work his 12-hour shift that night and that he was also confident in his ability to drive both himself and a fellow employee to work that day and to drive himself home again. Teck Coal says that this evidence establishes that while Mr. Commisso may have been feeling unwell, he was not impaired. They say it is not plausible to assert that Teck Coal should have had better knowledge of Mr. Commisso's impairment than Mr. Commisso himself did. Ultimately Teck Coal says that there is no factual foundation for a consideration of a duty of care on the basis that Teck Coal had knowledge or ought to have had knowledge of Mr. Commisso's alleged impairment due to illness.
- [20] Mr. Commisso asserted in argument that Teck Coal owed a duty of care to him to ensure he was able to drive home safely once it knew he was unwell, regardless of whether it knew he was impaired in his ability to drive. This is the duty of care that Teck Coal said is entirely novel and should not be recognized by this court.
- [21] However, Mr. Commisso also advances the position that Teck Coal owed him a duty of care based on his assertion that his supervisors were aware not only that he was unwell but that they "knew or ought to have known that due to illness his ability to drive was compromised." In inserting a duty of care based on these factual circumstances, Mr. Commisso relies upon Teck Coal's policies and case law relating to host liability in the employment setting, specifically *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.).
- [22] I have reviewed the evidence in the summary trial relating to the factual circumstances which Mr. Commisso says gives rise to a duty of care based on the knowledge or inferred knowledge of Teck Coal of his alleged impairment. There is conflicting evidence on a number of key issues that go to the factual foundation for establishing a duty of care on that basis, including:
- a) Whether Mr. Commisso was required to work December 25th: Teck Coal says that they were not expecting him and had not scheduled a shift for him, while Mr. Commisso says that he was required to work because he was scheduled to work that day and said that he would;

- b) Whether it was Teck Coal or Mr. Commisso that raised the issue that he was not well: Teck Coal witnesses say it was Mr. Commisso himself who raised that he was unwell while indicating that he was still prepared and able to work, while Mr. Commisso says it was his supervisor Mr. Gawreluk, who first noted that he did not look well and would not give him a shift;
 - c) Whether Mr. Commisso appeared ill that day: Teck Coal's witnesses said he did not appear ill or unable to work, while Mr. Commisso says that he has a number of witnesses who heard at least some of Teck Coal's witnesses say or suggest the opposite; and
 - d) Why Mr. Commisso did not work that day: Teck Coal says that he was given the option to take a shift but chose not to, while Mr. Commisso says he was refused a shift on the basis that he did not appear fit to work.
- [23] Furthermore, Mr. Commisso argues that even though he may have been confident in his ability to work and to drive, his ability to make this judgment was impaired by his illness. Essentially, he says that Teck Coal owed him a duty of care in circumstances where he says his supervisors determined that he was not fit to work and refused him a shift.
- [24] Overall, I find that the contested factual issues in the summary trial are highly relevant to the question of whether Teck Coal had come to the conclusion that Mr. Commisso was not fit to work and sent him home for that specific reason. If that is established on the evidence, as Mr. Commisso asserts, then Mr. Commisso may well also establish not just that he was unwell, but that Teck Coal knew or ought to have known that he was impaired in his ability to drive.
- [25] Teck Coal has conceded that if it had knowledge of the latter, a duty of care may arise on its part. Given this concession and the contested nature of the evidence that may lead a trier of fact or trial judge to make conclusions in this regard, I find that this issue cannot fairly be determined by summary trial.

Causation

- [26] The evidence at the summary trial does not establish to what extent Mr. Commisso was impaired in his ability to drive due to illness that evening, if at all, or whether that alleged impairment was the cause of the accident, as opposed to road conditions, speed or some other factor. Mr. Commisso anticipates leading expert evidence on these issues should this matter proceed to trial as scheduled, but this evidence is being prepared in anticipation of the April 2019 trial date and was not ready for the summary trial application.
- [27] Teck Coal acknowledges that Mr. Commisso has not yet completed preparation of his evidence on the broader issue of whether his state of health caused the accident and his related damages. It does not suggest that this evidence should have been available for the purposes of the summary trial. Teck Coal nevertheless seeks a dismissal of the claim on the narrower question of whether Mr. Commisso would have refused an alternative ride had one

been offered to him. Teck Coal says that given Mr. Commisso's admissions at examination for discovery that he was confident in both his ability to work and his ability to drive home, I should conclude on the basis of these admissions that he would not have accepted a ride had one been offered and therefore Mr. Commisso has not proven that Teck Coal caused his damages in failing to offer a ride.

- [28] This aspect of Teck Coal's application does more than sever the issue of liability from the issue of damages or even one element of liability, such as a duty of care or causation from other elements. It asks the court to slice off one aspect of the causation element in the absence of argument or evidence surrounding causation more generally.
- [29] In *Thomas v. The Roman Catholic Archbishop of Vancouver*, 2016 BCSC 1466, Mr. Justice Skolrood determined that where a summary trial application is brought on a discrete issue such as liability, a two-stage process is involved that requires an initial consideration as to whether the severance of that issue for consideration in isolation is appropriate. In that case he found that a separate consideration of liability apart from the issue of damages was warranted and dismissed the claim on the basis that the evidence before him established that there had been no breach of the defendant's standard of care or obligations under the Occupiers Liability Act, R.S.B.C. 1996, c. 337.
- [30] The issue that Teck Coal seeks summary determination of in this case is factual and only a part of the larger question of causation that must be proven by Mr. Commisso in making out his case. The weight to be given to evidence led by Mr. Commisso on this point should be assessed in the context of the whole of the evidence, and it is not appropriate to sever this issue from the larger factual context of the claim.

Conclusion

- [31] On the evidence before me the issue of whether Teck Coal knew that Mr. Commisso was impaired in his ability to work or drive safely, despite Mr. Commisso's own stated belief that he was capable of doing both, cannot be resolved on the summary trial. Teck Coal concedes that it could have a duty of care under its own policies if it had that knowledge. While it says that it did not have that knowledge, there is sufficient contradictory evidence on this point to require a trial on this key issue.
- [32] The narrow issue of causation raised by Teck Coal is not one that should be determined as a severable question from the issue of causation more generally. The plaintiff's evidence regarding causation is not well developed. However, he indicates that he will be prepared to proceed with the trial of these issues in April 2019, and I find that the issue of causation should be considered on the whole of the evidence at the trial at that time.
- [33] Finally, I note that at the hearing of this application Mr. Commisso relied on the proposition that Teck Coal, as the employer of Mr. Commisso, was in a position of supervision and control in relation to him and further relied upon the employer/employee relationship and Teck Coal's workplace policies to establish proximity. In support of the existence of a duty of

care, Mr. Commisso also argued that pursuant to Work Safe BC's Rehabilitation Services and Claims Manual, Volume II, Policy #C3-19.00 and decisions of the Worker's Compensation Appeal Tribunal (such as WCAT-2005-03914), remoteness of a work site and the limited availability of transportation are relevant factors in determining whether an employee suffered a compensable personal injury arising out of or in the course of employment while travelling to or from work under s. 5 of the Workers' Compensation Act, R.S.B.C. 1996, c. 492 [WCA].

[34] In light of these arguments, I raised the issue as to whether this action might be statute barred pursuant to the WCA. I received no submissions on this point, and I have made no determinations in this regard.

[35] I note that this matter is set to be heard by a jury in April 2019. While the question of whether a matter is statute barred under s. 10(1) of the WCA may arise at any time, it is important that this possibility be fully reviewed by counsel for both parties before this matter goes to a jury.

[SUBMISSIONS BY COUNSEL]

[36] Costs will be in the cause. It was important that the parties sought to clarify what the duty of care in this case is in advance of this matter going before a jury. So although the plaintiff was successful in defending this summary trial, I consider that it was a necessary step to seek to define issues such as the applicable duty of care.

"Marzari J."

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/18/22/2018BCSC2283.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/commisso-v-teck-coal-limited-2018>

Prepared on 29 October 2026 · Esheria