

CANADA / JUDGMENT

Conarrore v. Tallack

2020 BCSC 310

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 310 Conarrore v. Tallack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Conarrore v. Tallack,

2020 BCSC 310

Date: 20200124

Docket: M169155

Registry: Vancouver

Between:

Joseph Sean Michael Conarrore

Plaintiff

And

Phillip Anthony Tallack,

Her Majesty the Queen in right of the Province of British Columbia,

As represented by the Ministry of Transportation and Infrastructure,

and JPW Road & Bridge Inc.

Defendants

And

Phillip Anthony Tallack, Hujun Xiao

Shaojing Sun, Nikolay Radoslavov, and Solution Financial Inc.

Third Parties

Before: The Honourable Madam Justice Marzari

Oral Reasons for Judgment

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F. Kennelly

Counsel for the Defendant and Third Party,

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M. Silva

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2020

Introduction

- [1] THE COURT: Yesterday, I allowed counsel for the former party, JPW Road & Bridge Inc. ("JPW"), to be heard with respect to JPW's right to make submissions before me, despite the fact that JPW had been removed as a party by way of consent order earlier this month following a BC Ferries type of settlement.

- [2] On the basis of those initial submissions, which are tied to the reasons that I lay out below, I allowed counsel to address the issues of liability and the status of the Leggett and Macnabb reports that the defendant Mr. Tallack now seeks to rely upon to argue there should be an apportionment of liability to JPW as the road maintenance contractor.
- [3] I have found that these two reports are not admissible by the defendant Mr. Tallack for purposes of apportionment, and these are my reasons for that decision.
- [4] While I am giving oral reasons today, I anticipate that I may also articulate my reasons in the final written reasons I make with respect to this trial.

Background

- [5] I received submissions and evidence on the events leading up to the BC Ferries settlement that was reached in the month prior to trial, and the consent order that followed, and I make the following findings with respect to that evidence and regarding those events:
 - a) On October 18, 2019, the plaintiff served the Macnabb and Leggett report on all of the defendants. I understand these reports relate to issues related to road maintenance and conditions and were initially relied upon by the plaintiff as the basis of their claim in negligence against JPW and the Ministry of Transportation. I find that they were served on time by the plaintiff for the purposes of his reliance on them at trial under the Rules.
 - b) The defendant JPW also served, at around that time, an expert report addressing their standard of care and the standard of care of road maintenance contractors more generally under the Province's road maintenance contract--which I understand is a contract required for all contractors as a matter of policy or regulation of the Province and is a substantial document judging by the 3 - 4 inch binder that it occupies.
 - c) At that time, Mr. Tallack had pled contributory negligence of the plaintiff in this trial, as well as that the plaintiff's damages were caused or contributed to by the "negligent maintenance, design, service and/or construction of the highway" by the defendants Ministry of Transportation and Infrastructure and JPW. The particulars of that negligence were pled to be as set out in the plaintiff's notice of civil claim. Mr. Tallack did not file or allege liability by way of a third party action against JPW or the Ministry.
 - d) Mr. Tallack did not serve any expert reports relating to the Ministry or JPW's standard of care or liability before the deadline for service of such reports. Nor did Mr. Tallack, upon receipt of the Macnaab and Leggett reports from the plaintiff in relation to JPW's standard of care or breach thereof, re-serve those reports or indicate reliance upon those reports with respect to the apportionment issues between it and JPW and the Ministry. Nor did it indicate any intention to rely upon them.
 - e) Instead, on October 24, 2019, Mr. Tallack sent a letter objecting to the admissibility of the Macnaab and Leggett reports on nine different grounds.

- f) In advance of the TMC in early December and the rebuttal report deadline under the Rules, JPW served two rebuttal reports to the Macnabb and Leggett reports dealing with road maintenance and engineering evidence as well as detailed objections to the Macnabb and Leggett reports. These objections were significant and went to numerous issues, including the qualification of both experts to opine on the standard of care, the interpretation of the road maintenance contract, and of meteorological factors. For the purposes of this hearing, I do not find it necessary to consider or rule upon these objections.
- g) JPW also filed a trial brief that indicated that their witnesses and experts would require a five- to six-week trial to address these issues, where only a three-week trial was scheduled and available. This was an additional two to three weeks of court time that would have been required to address the road maintenance liability issues.
- h) Upon receipt of these reports, objections, and the trial brief from JPW, on or about December 3, 2019 the plaintiff made an offer to JPW in the form a BC Ferries type of settlement to dismiss the plaintiff's claims regarding road maintenance, and I understand and I accept that all parties were alerted to the nature of this offer.
- i) On December 5, there was a TMC in this Court at which I am satisfied that all parties knew that a BC Ferries settlement was being contemplated, and represented to the judge who heard that TMC that this settlement would allow the trial to proceed in the three weeks allotted. The trial date was confirmed by the TMC judge on the basis that the liability issues of JPW were to be resolved by way of agreement.
- j) After the TMC on December 5, 2019, Mr. Tallack gave notice to the plaintiff that he might seek to rely on the Macnabb and Leggett reports. He did not give that notice to JPW, and I find JPW and its counsel were not served with and remained unaware of Mr. Tallack's change in position from objecting to the admissibility of these reports to seeking to potentially rely upon them.
- k) I understand that a draft amended notice of civil claim removing all claims and particulars of negligence against JPW and the Ministry, as discussed and contemplated at the TMC, was circulated and was ultimately filed on December 18, 2019. While no consent order allowing for the filing of that amended notice of civil claim was entered, and Mr. Tallack did not sign a consent order to that effect, I accept that the amended notice of civil claim was consistent with the understanding of all the parties after the TMC.
- l) On December 23, Mr. Tallack filed an amended response to civil claim, also without a consent order. That filing may well have been appropriate as a responsive document, but it was not done on the basis of an agreement with the other parties or after circulation. That amended response added independent particulars of negligence to the pleading for apportionment against JPW.

- m) That amended response was served on the plaintiff at some point thereafter. It was not served on JPW, and I find that JPW was not aware of Mr. Tallack's independent allegations and particulars of negligence until after it finalized the BC Ferries settlement and the trial had started.
 - n) JPW and the plaintiff completed their negotiations of the BC Ferries agreement. The terms of that agreement were somewhat unusual in that JPW insisted on a consent dismissal order of the claims against it on their merits, rather than the more common discontinuance.
 - o) Mr. Tallack through his counsel signed this consent order. The order itself is dated January 3, 2020. It was filed on January 6th of this year.
 - p) I note a similar order was filed in relation to the plaintiff's claims against the Province.
 - q) I find that JPW continued to be a party of record at least until the signing of that consent order, and that JPW's counsel continued to be entitled to notice of amended pleadings to that date.
- [6] JPW's counsel discovered for the first time, while attending at the trial in the gallery, that Mr. Tallack had amended his pleadings and now intended to rely upon the Macnabb and Leggett reports to argue that liability should be apportioned to his client. JPW relies upon a provision of the BC Ferries agreement that he states requires the plaintiff to defend JPW's position, and allows JPW counsel to sit as second chair if any such issues arise.
- [7] While Plaintiff's counsel attempted to explain JPW's position in this regard, I directed that JPW's counsel attend in court to explain his position and the basis upon which he is entitled to make any submissions in light of JPW's removal from the litigation by way of the BC Ferries agreement. In the end I accepted his submissions with respect to JPW's standing to make arguments going to the admissibility of the Macnaab and Leggett reports in light of trial fairness and relevancy. I did not hear JPW's arguments as to the admissibility of those reports on other grounds, and find that I need not consider those to determine the issues before me at this point in the trial.

Determination

- [8] I have concluded that Mr. Tallack should not be permitted to rely on the Macnabb and Leggett reports to support his claims in apportionment for two main reasons:
- a) The plaintiff and JPW reasonably relied on Mr. Tallack's objection to the admissibility of the Macnaab and Leggett reports at the time they entered into the settlement of the road maintenance liability issues in December 2019, and allowing Mr. Tallack to reverse that position so close to the trial date and well after the deadline for doing so in the Rules would significantly prejudice both of them; and

- b) The consent order dismissing the plaintiff's negligence claim against JPW on its merits signed by Mr. Tallack makes the issue of JPW's negligence to the plaintiff *res judicata*, leaving no liability to apportion in this regard.

A. Reliance on Mr. Tallack's position up to date of TMC

- [9] Before me, counsel for Mr. Tallack argued that his objection letter to the Leggett and Macnabb reports was formulaic and should not have been relied upon to convey an actual objection to the admissibility of those reports.
- [10] Although perhaps it is not what was intended, I find that all parties were required to and entitled to rely on that objection letter as an expression of Mr. Tallack's submission that those reports should not and could not be admitted, and certainly that he had no intention to rely upon them. This position was also reiterated in Mr. Tallack's trial brief filed in November 2019.
- [11] I find that JPW and the plaintiff reasonably relied on Mr. Tallack's opposition to the admissibility of those reports when they began negotiating the BC Ferries agreement. JPW was also relying on case law that generally requires expert evidence in relation to the standard of care of a road maintenance contractor to establish a claim in negligence: see *Collins v. Rees*, 2012 BCSC 1460. Therefore, the context in which JPW and the plaintiff were negotiating the BC Ferries settlement was one where there was no evidence relied upon by anyone other than the plaintiff that could have established such liability.
- [12] In this context, counsel for the plaintiff and JPW, in particular, were entitled to pursue a BC Ferries agreement, and commit to a trial date and schedule at the TMC, on the basis that these reports would not be entered by anyone other than plaintiff, and there was opposition to the admissibility of these reports by both JPW and Mr. Tallack.
- [13] JPW was entitled to continue to rely on that state of affairs through to the completion of the BC Ferries settlement and the consent dismissal order dismissing the plaintiff's claims of negligence against it on their merits. JPW continued to be a party until that consent order was filed, and therefore Mr. Tallack was required to serve counsel with his late stated intent to rely on these reports and the change in his response pleadings regarding their negligence.
- [14] No notice of intention to rely on these reports by Mr. Tallack was ever served on JPW. Trial dates were confirmed at the TMC on the basis that JPW would not need to defend these allegations, and later on the basis of the circulated amended notice of civil claim. JPW had no notice of Mr. Tallack's amended response and the independent particulars of negligence it contained. JPW was also entitled to rely on its requirement and receipt of a consent order signed by Mr. Tallack dismissing the plaintiff's allegations of negligence against JPW on their merits.

- [15] Late admission of these reports in this case is therefore highly prejudicial to the plaintiff, who entered a BC Ferries agreement on the basis that it would allow this trial to proceed without this expert evidence and the weeks of additional evidence it entailed. It is also prejudicial to JPW as I find that they would not have entered into the BC Ferries agreement had their liability remained a live issue. I find that the consent order and the non-reliance on these reports by Mr. Tallack well past the deadline for serving expert reports and even the TMC, was an essential precondition for JPW entering into the BC Ferries settlement.
- [16] Finally, I accept that if the Macnabb and Leggett reports were admitted, particularly with respect to the issues of negligence of the road contractor for the purposes of apportionment, it would be unfair to the plaintiff to exclude responsive reports that were served on all parties by JPW on those issues.
- [17] When I initially accepted the plaintiff's position that they could not object to the admissibility of these reports because they were his own reports, I was not aware that Mr. Tallack, who sought to rely upon them, had in fact objected to their admissibility. Nor was I aware of the substantial objections to their admissibility by both Mr. Tallack and JPW. Finally, I was not aware that these objections were relied upon when the BC Ferries agreement was entered by both the plaintiff and JPW. At the very least, this change in position would require that I allow the plaintiff to object to the admissibility of these reports for substantive reasons, and to rely on the filed responsive reports and call related witnesses if necessary.
- [18] Doing any of that would jeopardize this trial date, and would undermine the very purpose of the BC Ferries agreement. That would be highly prejudicial to the plaintiff, who has now compromised his claims with respect to JPW specifically to allow this trial to proceed. That compromise was made in the context of a lack of evidence relied upon by Mr. Tallack to establish JPW's negligence, and substantial objections to the admissibility of the reports at all.
- [19] This is also of significant prejudice to all of the participants in this trial as a result of the delay and extension of the trial length to accommodate the responsive evidence to address the issue of standard and breach of care of JPW. I am satisfied that this was not contemplated by any of the parties before the judge at the TMC.
- [20] I therefore find that Mr. Tallack is not now entitled to rely on these reports on the basis of his late notice of his intention to do so under Rule 11-7(6). Mr. Tallack's notice of his intended reliance on these reports was not only late under the Rules, it was made after reliance had been placed on Mr. Tallack's objection to the admissibility of these reports by the plaintiff and JPW in negotiating a BC Ferries settlement, and by the court in affirming this trial date at the TMC.

- [21] Although the plaintiff had notice of this change prior to trial, Mr. Tallack's failure to notify JPW of his change in position resulted in matters progressing well into this trial before the matter could be addressed. It would now be unfair to both the plaintiff and to JPW to correct that failure by any means other than the exclusion of these reports.

Consent Orders

- [22] My trial fairness concerns alone are sufficient such that I would not allow Mr. Tallack to reverse his position on admissibility and rely upon the Macnabb and Leggett reports well past the service delivery deadline. However, the presence of the consent order independently raises another obstacle to any such reliance, and I will turn to that now.
- [23] I recognize (as do all the parties) that a BC Ferries agreement does not necessarily or even usually mean that apportionment of negligence is not an issue with respect to a settling defendant. It frequently will be, and there are fairly standard provisions of such agreements to address that.
- [24] However, I accept the submissions of JPW that those situations are generally accompanied by unilateral discontinuance by the plaintiff against the settling party with a corresponding amendment of the plaintiff's claim. Where apportionment of negligence or a third party claim remains a live issue, a BC Ferries agreement ought not to include dismissal by consent of all parties of the plaintiff's claims in negligence against the settling party in their entirety and on their merits.
- [25] Mr. Tallack says that in signing the consent order dismissing the plaintiff's claims of negligence against JPW and the Ministry, he was not doing anything more than that. He was not giving up his own claim to apportionment on the basis of JPW's negligence.
- [26] I find this argument difficult to reconcile with the wording of the consent order and the nature of apportionment, particularly in the absence of independent pleadings or an independent third party claim.
- [27] It is well established that it is open to a defendant in a claim of negligence to plead apportionment of liability of a non-party under the Negligence Act, R.S.B.C. 1996, c. 333. I refer in that regard to the case law following our Court of Appeal's decision in *Wells v. McBrine* (1988), 33 B.C.L.R. (2d) 86 (C.A.) and helpfully reviewed and summarized by Madam Justice Sharma in *MacDonald v. Cunniff*, 2016 BCSC 559.
- [28] Such an apportionment pleading may also be maintained after a BC Ferries agreement removes the settling party. Such an agreement generally does not require the defendant pleading apportionment to consent to or give up their claims in apportionment.

- [29] However, Mr. Tallack did more than receive notice of a BC Ferries agreement or agree to the filing of an amended notice of civil claim removing claims against JPW or the Ministry. In this case, Mr. Tallack consented to a dismissal of the plaintiff's claim in negligence against these defendants on their merits; that is, Mr. Tallack consented to a determination that the plaintiff had no claim in negligence against these defendants.
- [30] A claim for contribution or apportionment under s. 4 of the Negligence Act is not an independent claim akin to a third party action. It is a pleading that more than one party contributed to the damage to the plaintiff through their negligence, in that that party breached a standard of care with respect to a duty of care owed to the plaintiff. As was stated by our Court of Appeal in *Cempel v. Harrison Hot Springs* (1997), 43 B.C.L.R. (3d) 219 (C.A.) and this is at para. 19:

The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

- [31] Mr. Tallack's apportionment pleading originally relied upon the particulars of negligence pled in the plaintiff's notice of civil claim. Mr. Tallack's amended response adds independent particulars of negligence by JPW, but does so not in the context of an independent allegation of negligence or duty owed to Mr. Tallack, but in the context of apportionment of breaches of care owed to the plaintiff alone.
- [32] Even had the amended response pleading particulars of negligence been properly served on JPW or the Ministry while they remained parties, the subsequently signed and entered consent dismissal order disposed, on their merits finally and completely, with any claims that the plaintiff had in alleging a duty of care and negligence against JPW and the Ministry.
- [33] Even if this were a consent order relating to the negligence of a non-party who was never the subject of a claim, Mr. Tallack's agreement that that party was not negligent in relation to duties of care owed to the plaintiff would foreclose any apportionment of fault to that non-party. Where such negligence has been pled and particularized, an order by consent determining that there was no such negligence is determinative of this issue for the existing parties.
- [34] I find that there is no degree of fault, that is, a duty of care owed to the plaintiff and a breach of a standard of that care, that is left to apportion as a result of both Mr. Conarro and Mr. Tallack's agreement that all such claims were dismissed on their merits.

Conclusion

[35] I find that JPW reasonably relied on the history of litigation and the lack of any expert evidence relied upon by Mr. Tallack as to its liability at the time it accepted the BC Ferries agreement. JPW also insisted upon and obtained a consent order which removed any claim of liability against it by the plaintiff. No consent order would have been possible had Mr. Tallack not consented to it. In signing that order, Mr. Tallack agreed that there was no claim in negligence by the plaintiff against JPW (or the Province) to apportion.

[36] Even if I am wrong in this, I find that the late notice of Mr. Tallack's intention to rely on the Leggett and Macnabb reports cannot be excused under Rule 11-7(6). The following factors make Mr. Tallack's post-TMC reversal of his position on the admissibility, and his late notice of intention to rely upon these reports, prejudicial to JPW and the plaintiff and unfair in the context of the trial as a whole:

- a) the party positions leading up to and at the TMC;
- b) the confirmation of the trial date for a 3 week trial at the TMC;
- c) the BC Ferries settlement agreement between JPW and the plaintiff;
- d) the absence of any other evidence to establish a breach of the standard of care of the road contractor in the form of expert reports prior to the TMC; and
- e) the consent order dismissing on their merits the plaintiffs allegations of negligence against JPW.

[37] That is my decision with respect to admission of the Leggett and Macnabb reports and the issue of apportionment of liability to JPW. However, I remain open to the possibility, which was urged upon me by Mr. Tallack and not objected to by the plaintiff, that portions of these reports may still be admissible in relation to the engineering dynamics of the collision at issue and the relative liability of Mr. Tallack and Mr. Conarro.

[38] I remain open to this possibility on the basis that the reports were served on the plaintiff within a reasonable amount of time for this purpose, although late. I understand that there is the possibility that they could be used for this purpose against the plaintiff, as opposed to as between the plaintiff and JPW. I have not read the reports. I do not know whether that is in fact the case, but that is what has been represented to me.

[39] Admissibility of the reports therefore still has to be determined, and I give the plaintiff the right to make arguments as to relevance and admissibility. Although these are originally the plaintiff's reports, and it was originally agreed that the plaintiff was constrained in objecting to the admissibility of its own reports, I no longer consider the plaintiff bound to support the admissibility of the reports for a number of reasons, including:

- a) Mr. Tallack's original position that they were not admissible;

- b) The lengthy and substantive objections made by JPW which go to the general admissibility of these reports as expert evidence; and
- c) The plaintiff's essential acceptance of that position by way of entering into a settlement and consent dismissal indicating the limitations of these reports and ceasing to rely upon the opinions in those reports.

[40] I will require submissions on admissibility of these reports before they are entered into evidence for this alternate purpose. As Mr. Tallack is no longer objecting to them and instead relying upon them, I will require the plaintiff to take a position on their admissibility, including with respect to their relevance, in light of my decision that they are not admissible with respect to the issue of negligence of JPW.

[41] I do not know what in those reports is only relevant to the negligence and apportionment issues, but I am not going to admit reports that have no relevance to the issues that I have determined are still live in this trial.

[42] It may be that with redactions the plaintiff will be satisfied that there is no need to make objections as to the relevance of the reports. I would still have to consider their admissibility as a result of my gatekeeper role under *White Burgess Langille Inman Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 [WBLI] but agreement on a form of the report with redactions as to relevance would certainly be appreciated before I undertake the WBLI analysis with respect to them.

[43] Those are my reasons.

"Marzari J."

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