

CANADA / JUDGMENT

Cox v. Swartz Estate

2022 BCSC 1494

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Supreme Court of British Columbia

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2022 BCSC 1494 Cox v. Swartz Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cox v. Swartz Estate,

2022 BCSC 1494

Date: 20220826

Docket: 172469

Registry: Victoria

Between:

Charles Cox

Plaintiff

And

Aaron Alexander Swartz, deceased, and Gina Gervais

Defendant

Insurance Corporation of British Columbia

Third-Party

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

N.A. Mosky

T.C. Chiu

Counsel for defendant Gina Gervais:

B.L. Hoffmann

Counsel for defendant Aaron Swartz, deceased:

No Appearance

Counsel for Third Party, Insurance Corporation of BC:

C. Wydrzynski

B. Flanagan

Place and Dates of Trial:

Victoria, B.C.

March 21, 22, 29, 30, 31, 2022

April 1, 4, 5, 6 and 8, 2022

May 5, 6, 2022

Place and Date of Judgment:

Victoria, B.C.

August 26, 2022

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Introduction

- [1] This application concerns the trial of Charles Cox's damages claims arising from serious injuries sustained in a car accident on December 31, 2016. It is alleged that Mr. Cox was riding as a passenger in a vehicle owned by the defendant Gina Gervais and driven by the defendant Aaron Swartz. Mr. Swartz died in the accident. The Insurance Corporation of British Columbia ("ICBC") is defending the claim against Mr. Swartz because it has denied insurance coverage for his negligence. Ms. Gervais was also a passenger in the vehicle at the time of the accident.
- [2] Mr. Cox is 45 years old. He suffered a significant head injury in the collision and has no memory of the events immediately before the accident or for weeks after December 2016.
- [3] The trial commenced March 21, 2022 and both parties closed their cases by April 6, 2022. Counsel for the plaintiff mistakenly believed that liability was not in issue in the trial; accordingly, the plaintiff tendered no evidence concerning Mr. Swartz's liability for the accident, nor mentioned Ms. Gervais's role in the accident.
- [4] Before final argument began, the plaintiff made this application to reopen his case because he had not tendered any evidence concerning the defendant's liability before closing his case. Initially, he applied to reopen his case and adduce evidence from Ms. Gervais by reading into the record examination for discovery evidence she had given earlier concerning details about the accident. He also wished to introduce expert testimony relating to Mr. Swartz's level of impairment at the time of the accident.
- [5] The plaintiff's application commenced on April 8, 2022 and was more fully argued in early May. At that time, the plaintiff's application was narrowed to a request to reopen his case to call only viva voce evidence from Ms. Gervais. The plaintiff does not seek to call the defence toxicology expert.

The Issue

- [6] The overarching issue on this application is whether a miscarriage of justice will probably occur without the proposed evidence from Ms. Gervais (the defendant), whether the evidence would probably change the outcome of the trial, and whether counsel's error is a sufficient basis for reopening a trial to introduce evidence that was in his possession when the trial began.

Chronology

- [7] On December 31, 2015, the plaintiff was injured in a car accident. The plaintiff does not recall events preceding the accident or for several weeks after the accident. He was hospitalized and suffered a brain injury among many other injuries.

- [8] On June 28, 2017, the plaintiff filed a notice of civil claim.
- [9] On November 7, 2017, ICBC filed a third party notice indicating that it had denied coverage to Mr. Swartz; he had died in the accident and would become third party pursuant to s. 77 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. ICBC's response to civil claim was filed the same day. Mr. Swartz's estate did not defend the action.
- [10] On August 24, 2018, Ms. Gervais filed a response to civil claim.
- [11] On March 2021, the parties attended mediation of their dispute.
- [12] On January 5, 2022, the plaintiff filed a trial management conference ("TMC") brief that included a representation that liability was an issue in dispute.
- [13] On January 10, 2022, ICBC filed its TMC brief, indicating that it continued to deny liability for the accident.
- [14] On January 12, 2022, Ms. Gervais filed her TMC brief, indicating that liability was in issue.
- [15] The TMC was held March 21, 2022. There was no indication at the TMC that the liability issues had been resolved.
- [16] On March 21, 2022, the trial began with the plaintiff's opening statement.
- [17] On April 5, 2022, the plaintiff closed his case and defendant and third party opened their cases.
- [18] On April 8, 2022, the plaintiff applied to reopen his case, seeking to rely on Ms. Gervais' discovery evidence and an opinion from a toxicologist. Argument on the application concluded on May 5 and 6, 2022.
- [19] On May 5, 2022, the plaintiff continued with his application but abandoned the request to tender the toxicologist's opinion evidence. He requested that Ms. Gervais testify orally as part of the plaintiff's case.

The Pleadings

- [20] The background to this aspect of the case begins with the plaintiff's notice of civil claim, followed by responses from the defendant and third parties, which denied the facts concerning the accident and Mr. Swartz's negligence generally.
- [21] The plaintiff pleaded that Mr. Swartz's negligence caused the accident, setting out an itemized list of particulars, including:
- a) failing to keep an adequate lookout;
 - b) failing to drive in a careful and prudent manner;
 - c) operating a vehicle with faulty brakes;

- d) driving the vehicle when his ability was impaired by alcohol, drugs, or fatigue;
 - e) driving at an excessive speed; and
 - f) failing to keep proper control of the car.
- [22] The plaintiff also pleaded particulars of Ms. Gervais' negligence, including that she consented to Mr. Swartz's operation of her vehicle knowing the vehicle was in an unsafe state of repair, among other specific claims of negligence. The plaintiff did not specifically rely on s. 86 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, but he referred to Ms. Gervais as the registered owner from which I infer he was seeking a finding that she was vicariously liable for Mr. Swartz's action.
- [23] The defendant and third party denied liability and claimed that neither of them had been negligent as alleged. The third party's pleadings allege that the collision occurred without negligence on the part of Mr. Swartz, and that it was due to an inevitable accident beyond his control. Specifically, the third party pleads defences of:
- a) inevitable accident (the black ice defence);
 - b) contributory negligence (the seat belt and head rest defences); and
 - c) contributory negligence due to the driver's impairment by drugs or alcohol.
- [24] The defendant's response is slightly different from the third-party response but includes a denial the allegations of negligence generally "as they relate to the defendant Gervais".

Evidence on this Application

- [25] In support of the plaintiff's application, plaintiff's counsel provided two affidavits explaining his reasons for not calling evidence on the negligence issue before closing the plaintiff's case. He said he had made an erroneous assumption that liability for the accident was admitted and evidence on this point was not necessary. He concedes this was his error alone based on his "understanding" that liability was "not in issue".
- [26] Plaintiff's counsel was aware that Ms. Gervais had also commenced an action against Mr. Swartz and in that proceeding pleaded that his negligence caused the collision and her injuries; based in part on that pleading, the plaintiff believed Ms. Gervais was not disputing negligence. Plaintiff's counsel also said that he was influenced by representations at the opening of the trial made by the third party and defendant that they would not be leading evidence on the liability issue. He said these representations fuelled his misunderstanding that liability was not in issue.
- [27] Mediation of the plaintiff's dispute in March 2021 failed to resolve the issues; counsel said that after this mediation his "understanding that liability was not in issue" persisted.

- [28] Plaintiff's counsel's understanding on the liability issue was further informed by defence counsel's earlier decision to abandon the possibility of a separate liability trial.
- [29] Responding affidavits were delivered by the third party and defendant challenging, in part, counsel's explanation for his decision not to present evidence on the liability question.
- [30] Plaintiff's counsel provided a written opening statement supplemented by comments made orally in opening his case.
- [31] The written opening including the following:
16. Mr. Swartz's ability to operate the motor vehicle was impaired by marijuana and alcohol.
 17. Mr. Swartz operated the motor vehicle negligently and his negligence and impairment caused a single vehicle rollover collision accident to occur.
 18. Ms. Gervais is vicariously liable for the actions of Mr. Swartz in causing the motor vehicle accident.

[32] Counsel's oral statement made at the opening of the trial included the following:

Now, turning our focus to the accident, which is the subject of this claim, as mentioned it was New Year's Eve, December 31, 2016. On that date, Mr. Cox was a passenger in a 1989 Honda Civic automobile owned by Gina Gervais, and operated by Aaron Swartz. Miss Gervais was also a passenger in the vehicle.

The evidence will show that Mr. Swartz's ability to operate the motor vehicle was impaired by marijuana and alcohol. Mr. Swartz operated the vehicle negligently and his negligence and impairment caused a single vehicle rollover - collision accident to occur. Over on page 4, I've included a photograph which will be - - we'll seek to tender into evidence of the aftermath of the rollover accident.

It is the plaintiff's position that Ms. Gervais is vicariously liable for the actions of Mr. Swartz and causing the motor vehicle accident. It's the - - I anticipate the evidence will demonstrate that there is no evidence of contributory negligence on the part of Mr. Cox.

[Emphasis added].

- [33] Plaintiff's counsel provided a "Plaintiff's Proposed Trial Plan" that included the witnesses he intended to cross-examine, including Gina Gervais and Carolyn Kirkwood (the defence toxicologist); neither of these people were included on the plaintiff's witness lists and neither person testified at the trial.
- [34] None of the parties indicated whether liability was or was not in issue when their cases opened.

[35] During the trial, it became clear the defence would not be leading evidence on liability; most importantly, it became clear that they would not be leading evidence from Ms. Gervais or Ms. Kirkwood, although they were listed on the plaintiff's trial schedule plan and in the third party and defendant' TMC briefs.

[36] Plaintiff's counsel said it was not until preparing closing submissions that he realized no formal liability admission had been made; thus, his application proceeds under objection from the third party and the defendant. In his affidavit he said:

Immediately prior to the opening of Trial, counsel raised the question of whether liability was in dispute. I don't remember precisely what was said and I concede that it may merely have been the defence would not be leading evidence on liability. However, perhaps because of my prior assumptions as to the liability issue, I understood from that discussion that the defendant Gervais and the third party would not be disputing liability.

[Emphasis added.]

[37] Counsel did not turn his mind to calling evidence on liability because he did not believe liability was in issue.

[38] Counsel said he was not intentionally misled by defence counsel nor did he recall any acknowledgement that liability was admitted. He said that in the year after the mediation, there were conversations and correspondence that led him to assume the defendant would not require proof of Mr. Swartz's negligence; he assumed that liability had been admitted or acknowledged by the defendant and third party.

[39] The defendant and third-party cross-examined plaintiff's counsel on the reliability of his memory and the assumptions that informed his decision not to adduce evidence of Mr. Swartz's negligence.

[40] The defendant and third-party point to multiple exchanges in writing in which they asserted that liability was a live issue. Moreover, the parties exchanged TMC briefs before trial, and each of those documents indicate liability remained an issue for trial.

[41] Mr. Wydrzynski, who was trial counsel for the third party, provided an affidavit reporting that on March 9, 2022, there was a videoconference with counsel for the plaintiff and the defendant. He said he discussed the possibility of limiting Mr. Cox's claim to Ms. Gervais' policy limits in return for an admission of liability for the collision. He said this offer was rejected by plaintiff's counsel and there were no other discussions about liability before the trial. Plaintiff's counsel does not recall the offer made by the third party but wrote to the third party adjuster and claimed the plaintiff might recover damages "well past policy limits".

[42] Mr. Wydrzynski referred to a discussion between counsel at a lunch break during the trial concerning evidence the defendant would be tendering. He could not remember the exact date but estimates the discussion was on March 30. In that conversation, he said the

defendant and third party advised that they would not be relying on a black ice defence, would not argue contributory negligence, and were not calling their toxicology expert. At no point in that conversation did they make any admission of the defendant and third party's liability. The plaintiff thought this exchange might have happened earlier in the trial.

- [43] Ms. Nicole Cederberg, counsel for the third party, also provided an affidavit setting out discussions/correspondence between counsel concerning the severance of liability from the damages case. She said this plan was eventually abandoned.
- [44] In March 2021, she wrote to plaintiff's counsel to schedule the trial for March 22, 2022, and she included a comment that the third-party intended to argue all defences at trial.
- [45] In July 2021, after a mediation failed to resolve the issues between the parties, plaintiff's counsel wrote to Ms. Cederberg, asking if the inevitable accident defence would still be argued. In response, Ms. Cederberg said that the defence would be maintained.
- [46] The third party contends that correspondence from 2019 to July 2021 repeatedly stated that liability is in issue. This position was reiterated in the third party's January 2022 TMC brief, wherein it confirmed that liability was in issue in the upcoming trial.
- [47] Plaintiff's counsel was cross-examined on his affidavit and said that he had formed the view that liability was not in issue after the mediation in 2021. He confirmed:
- a) no one told him that liability had been admitted or would be admitted;
 - b) in May 2021, the third party set out its intention to argue all defences set out in the pleadings;
 - c) after the mediation, counsel for the third party wrote to him and told him that the inevitable accident defence was maintained; and
 - d) during the mediation, counsel for the third party told him that if settlement was not achieved, the third party was preserving all of its defences for trial.
- [48] He was candid in saying that his understanding regarding the defendant\third party's positions on liability stemmed from inferences that he made and understandings related to conversations held with counsel.
- [49] Plaintiff's counsel was not misled on the question of the defendant\third parties' admissions; he said "I made an erroneous assumption" about the defendant' and third party's positions on liability. He failed to lead evidence as part of the plaintiff's case solely due to his erroneous misunderstanding that liability was admitted.

The Legal Framework

- [50] The court has a broad discretion to permit a party to reopen its case and tender evidence to prevent fundamental miscarriages of justice. The power is to be used sparingly and with care to prevent frauds and abuses of the courts process that might result: see *Clayton v. British American Securities Ltd.* (1934), [1934] 3 W.W.R. 257, [1935] 1 D.L.R. 432 at 440 (BCCA) [Clayton]; *Graham v. Galaxie Signs Ltd.*, 2013 BCCA 266 at para. 33 (leave to appeal ref'd: 2014 CanLII 5831 (SCC)) [Galaxie Signs].
- [51] The test for reopening of a trial to bring new evidence into the case is whether the applicant has shown on a balance of probabilities that (1) a miscarriage of justice would probably occur without reopening the trial, and (2) the new evidence would probably have changed the result of the trial: *Grewal v. Grewal*, 2016 BCCA 237 [Grewal] at para. 71; *Galaxie Signs* at para. 33. As noted in *Cowichan Valley (Reginal District) v. Jeffries* (1983), 46 B.C.L.R. 303, 1983 CanLII 484 (BCSC) [Cowichan Valley] at para. 13, for the purposes of the test, the evidence must indeed be fresh evidence: It must have come to the applicant's attention after trial, without being reasonably discoverable beforehand.
- [52] The farther a trial has proceeded and the more evidence that has been presented, the more stringently the test must be applied and the narrower the scope of the court's discretion to reopen the trial. Reopening may still occur after judgment has been granted, but greater scrutiny must be applied in such cases: *Clayton* at 440; *Vander Ende v. Vander Ende*, 2010 BCSC 597 at para. 84.
- [53] The plaintiff contends that the authorities referred to below inform the court on the test to be applied. He contends the cases relied on by the defendant and third-party. These the decisions include:
- a. *Galaxie Signs* at para. 33;
 - b. *Walker v. Leung*, 2014 BCSC 1623 at paras. 131-132;
 - c. *AME Distribution Inc. Wang*, 2019 BCSC 95 at para 8-12 [AME]; and
 - d. *Grewal* at paras. 70-71.
- [54] The "onus is on the applicant to demonstrate first, that a miscarriage of justice would probably occur unless the matter is reopened, and second, that the new evidence would probably change the result": *AME* at para. 9.
- [55] Miscarriages of justice do not result from simple unfairness perceived by a party that has failed to adduce evidence. This is a procedural issue usually and should be invoked where "the judicial procedure at issue [has not been] a judicial procedure at all": see *Lin v. Tang*, [1997] 9 W.W.R. 679, 1997 CanLII 2675 (BCCA) at paras. 61-64.

- [56] It is not necessary for an applicant to show that they have been deliberately misled or deceived in order to reopen a trial. However, it is clear that "'miscarriage of justice' means something far beyond the possibility that a different result might have been reached"; a miscarriage of justice is "a result that would leave one party with such an unfair benefit or advantage at the expense of the other that a reasonable person would regard it as shocking and unconscionable": *Aquiline Resources Inc. et al. v. Wilson et al.*, 2005 BCSC 1461 [Aquiline] at para. 12.
- [57] Citing to *Mandzuk v. Viera* (1983), 43 B.C.L.R. 347, 1983 CanLII 448 (BCSC) [Mandzuk], the defence contends that the court should not permit reopening of cases unless refusal to do so would yield a substantially unjust result, as the rule, "too freely applied", could become susceptible to abuse, encouraging carelessness (para. 6). In *Mandzuk*, McLachlin J. (as she then was) reviewed several principles pertaining to former Rule 40(7) (now Rule 12-5(3) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"))--a rule that permitted the court to proceed with a trial while allowing a fact to be proved afterwards. This rule refers to "facts" and not opinions; that distinction accords with the authorities. The defence thus contends that the court's discretion to permit reopening of a case extends only to facts omitted, but not proof of opinions, and it therefore does not permit reception after the trial of opinion evidence: *Mandzuk* at para. 6; *Mohajeriko v. Gandomi*, 2010 BCSC 60 at para. 32.
- [58] In *Mandzuk* at para. 6, McLachlin J. set out the following principles regarding former Rule 40(7) (now 12-5(3)):
- a) reopening is easily susceptible to abuse and liable to encourage carelessness if freely engaged;
 - b) the rule should not permit a party to put in its case twice;
 - c) the rule should not be used to allow introduction of "a substantial amount of new evidence relating generally to issues in the case";
 - d) the rule refers to "some fact" but not to proof of opinions. It does not permit reception after the trial of opinion evidence;
 - e) to avoid abuse of the rule, it is relevant for the court to inquire into the reasons for the failure to prove the omitted fact at trial. It is not essential to establish that the failure to tender the evidence was the consequence of an accidental slip or oversight, although the reason for reopening should exclude the possibility that the applicant deliberately or heedlessly split the case, thereby abusing the court process.
- [59] In *Moradkhan v. Mofidi*, 2013 BCCA 132 [Moradkhan], the applicant lost a summary trial motion and sought to reopen the trial to adduce further evidence, including evidence as to the value of property that was in issue. On those facts, the Court of Appeal said the trial court should not have permitted the parties to adduce vast volumes of evidence, particularly evidence that was available at the time of the original trial.

[60] Garson J.A. set out the following principles at para. 31 of Moradkhan:

[31] I agree with, and adopt the comments of MacKenzie J. I would summarize the main principles applicable to such an application in the following way:

- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- a judge's unfettered discretion to reopen a trial should be exercised with restraint;
- a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

[61] In *Seiler v. Mutual Fire Insurance Co. of British Columbia*, 2003 BCCA 696 (leave to appeal ref'd: 2004 CarswellBC 1968 (WL)), the court addressed an application to reopen the plaintiff's case after a nonsuit motion succeeded because the plaintiff had failed to lead evidence on the standard of care and there was no evidence of causation. In that case, the court said the plaintiff's decision not to call evidence was not an oversight, but rather, a reflection of counsel's assessment that no expert evidence was necessary. The trial court found that to permit the plaintiff to call further evidence would permit the splitting of his case on the question of the duty of care. The Court of Appeal dismissed the plaintiff's application to extend the time for service of a notice to appeal, finding that it was not in the interests of justice to permit the appeal to proceed.

[62] Here, the plaintiff's application comes well before any submissions or determination on the merits of the trial evidence.

[63] Regarding the question of whether the new evidence would likely produce a different result, the parties' arguments center on whether the evidence sought to be admitted by the plaintiff would be capable of supporting an inference of negligence, or whether such an inference would necessarily be speculative. The defendant and third party argue that the evidence sought to be admitted proves nothing more than the fact of the single vehicle accident, and they submit that this is not enough to support an inference of negligence in the circumstances. I will discuss this issue in more detail later in these reasons.

Parties' Submissions

- [64] The plaintiff recognizes that the onus is on him to establish that a miscarriage of justice will "probably occur" if the trial is not reopened and he must establish that the new evidence "would probably change the result".
- [65] Absent an opportunity to adduce this evidence, the plaintiff contends there will be a substantial miscarriage of justice because he will not be able to establish Mr. Swartz's fault and negligence for the collision. Conversely, he says that if Ms. Gervais' new evidence is permitted, no significant prejudice will fall on the defendant.
- [66] The plaintiff contends the court should exercise its discretion to permit reopening of the case. It argues the court retains broad discretion in the circumstances, in part because judgment has not yet been given. Moreover, he submits argument has not yet been made and there is no suggestion that admission of the evidence would amount to a fraud on the court or an abuse of the court's process.
- [67] Although the plaintiff was, at the time of trial, in possession of the evidence he now wishes to tender, in the unique circumstances of this case, he submits that the reasons described by plaintiff's counsel for not leading the evidence warrant the admission of the new evidence.
- [68] The plaintiff contends that the threshold question concerning the impact of the evidence on the result will be met because there is, at least, a prima facie case that Ms. Gervais' testimony will establish that Mr. Swartz's negligence was a cause of the accident and the plaintiff's injuries.
- [69] The plaintiff contends that Ms. Gervais's evidence alone will be enough that the court will be able to infer this was a single vehicle accident, with some evidence that Mr. Swartz was driving negligently when the vehicle went off the roadway.
- [70] Initially, the plaintiff sought to rely on a toxicologist's report from January 9, 2019 obtained by the defendant and the third party indicating Mr. Swartz had a blood-alcohol content of .13% at the time of the accident. There was also some evidence of his ingestion of cannabis. The plaintiff does not intend to lead this evidence and argues that Mr. Swartz's negligent driving can be established on the basis of Ms. Gervais' testimony alone.
- [71] Plaintiff's counsel argues that his pretrial decision not to lead Ms. Gervais' evidence was not strategic or animated by any benefit that could accrue to Mr. Cox's case. He contends there could be no possible strategic reason for his failure to lead evidence as to liability, other than counsel's explanation of a straightforward error and misunderstanding.
- [72] In short, the plaintiff argues this was a single vehicle accident caused when Mr. Swartz negligently failed to keep the vehicle on the roadway and the only remaining question is whether the third party is able to call evidence that he was not negligent.

The Defendant/Third Party Positions

- [73] The defendant\third party outlined reasons why I could not find any formal admission as to liability in the evidence and that the plaintiff was simply negligent in not clarifying that issue.
- [74] The defendant adopts the third party's submissions. They contend that no miscarriage of justice will occur if new evidence is not permitted and, in any event, the proposed evidence would not change the result of the trial. Last, they contend the evidence was available to the plaintiff during the trial and counsel made a deliberate and strategic decision to not rely on this evidence.
- [75] The defendant and third party contend plaintiff's counsel's assumptions concerning admissions of liability were not simple mistakes but were predicated on a strategic decision.
- [76] The defendant and third party contend that the plaintiff's counsel was disingenuous in stating his reasons for not tendering evidence about Mr. Swartz's negligence. Their course of conduct inducing him to believe liability was admitted are without merit. The plaintiff filed his trial brief as late as March 2022 confirming that liability remained an outstanding issue in the upcoming trial. As noted, the parties did not mention the question of liability at the trial management conference.
- [77] In March 2022, the plaintiff examined Ms. Gervais for discovery and reached a reciprocity consent order concerning his use of her discovery from a separate action she had commenced against Mr. Cox in this trial. The third party contends that this discovery and the consent order would have been unnecessary or of no utility if plaintiff's counsel genuinely believed that liability had been admitted.
- [78] Given plaintiff's counsel's actions and decisions before the trial commenced, the defendant and third party also question his assertion to assume liability was admitted well before the trial date (being some time after the 2021 mediation). Moreover, the plaintiff's opening statement at trial discussed in detail the liability issues to be addressed; in particular, plaintiff's counsel said "the evidence will show that Mr. Swartz's ability to operate the motor vehicle was impaired by marihuana and alcohol and Mr. Swartz operated the vehicle negligently, and his negligence and impairment resulted in a single vehicle rollover collision "
- [79] Strangely, the defendant and third party did not inform the court that liability was at issue when they began their cases. They set out the evidentiary plan they intended to pursue on questions concerning Mr. Cox's damages without mentioning that liability was in issue. After the defendant's opening, it was my understanding that liability was not in issue. I accept that this trial was an adversarial process but, in my view the court should have been alerted to the fact that liability remained an issue by defence counsel when opening its case.

- [80] The defendant and third party emphasized that the courts discretion to reopen a party's case must be exercised cautiously to avoid fraud or abuse of process. They reiterated that evidence must be such that if admitted it would probably affect the outcome of the trial. They emphasized that the evidence must not have been available to the applicant during the trial. They contend that the concept of a "miscarriage of justice" does not extend to unfairness that results from a decision made by counsel. Rather, they emphasize that a miscarriage of justice is when the unfair benefit received by one party at the expense of the other would be regarded by a reasonable person as shocking and unconscionable: *Aquiline* at para. 12.
- [81] Most importantly the defendant\third party argue that the court cannot infer negligence from only the fact of a single vehicle accident, without something more. They relied on decisions holding that *res ipsa loquitur* is no longer a helpful legal proposition to establish liability based on inferences not supported by evidence other than the car leaving the roadway. Absent some evidence of negligence resulting in this single car accident, the defendant contend that liability cannot be established. However, if some evidence supports an inference of negligence against the defendant, that defendant may be required to present evidence obviating a finding of negligence, failing which plaintiff will succeed on the liability question: *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 1998 CanLII 814 (SCC) at para 26-27 [*Fontaine*]. However, the court must be cautious not too easily rely on inferences of negligence without some factual foundation. The defendant and third party relied on the following cases in support of their submission that the simple fact of a single vehicle leaving the road is not sufficient to warrant an inference of negligence on a balance of probabilities:
- a) *Haynes v. Haynes*, 2017 BCCA 131 (leave to appeal ref'd: 2017 CanLII 80424 (SCC)) at para. 22;
 - b) *Jacobs v. Basil*, 2017 BCSC 1339; and
 - c) *McKenzie v. Mills*, 2013 BCSC 1505.
- [82] The defendant\third party argue that, even taking into consideration the proposed evidence from Ms. Gervais, there is insufficient support for an inference of some negligence on the part of Mr. Swartz. They say that a finding to that effect would be based on mere conjecture or speculation. An inference must flow logically from facts already proven; it cannot be mere conjecture or speculation (see e.g., *Nason v. Nunes*, 2008 BCCA 203 at para. 15).
- [83] The defendant and third party contend that Ms. Gervais' evidence is not likely to change the result because the court cannot reasonably infer negligence on the part of either defendant or third-party on the facts presented.
- [84] The defendant and third party also contend that Rule 12-5(3) does not permit the introduction of the type of evidence the plaintiff proposes to tender on his claim. Reopening is to be used sparingly and where substantial injustice might otherwise be occur and not to excuse a plaintiffs lawyer's carelessness. .

- [85] They argued that the Rule does not permit new evidence on broader issues in a case rather than evidence of a "fact" connoting a more limited scope for the rule. They say the rule, which has been used to allow for new evidence in cases of accidental slips or oversights, should not be expanded to permit a party to split its case.
- [86] They contend that the plaintiff deliberately split his case and that nothing in the proposed evidence is likely to change the result. Absent the happening of the accident, there is no evidence except for speculation concerning the defendant's driving. Accordingly, they say the admission of Ms. Gervais' evidence will not change the result and no miscarriage of justice will result from a refusal to permit the plaintiff to reopen his case.

Analysis

- [87] I am satisfied that plaintiff's counsel made a serious error in assuming liability for the subject collision had been admitted without confirming that assumption either at the trial management conference, the opening of the trial, or the conclusion of the plaintiff's case. The magnitude of the lawyer's error on this point is significant. In his opening statement to the court, he made comments indicating there would be evidence would called on the liability question. It is almost beyond belief that he could have made those statements if he truly believed at that time liability had been admitted.
- [88] There were no indications in the plaintiff's pretrial representations that liability was not in issue. He was not intending to call either Ms. Gervais or Ms. Kirkwood as part of the plaintiff's case and was content to simply cross-examine them if they were called by the defence. Even after he learned those witnesses would not be called by the defence, he made no effort to obtain their attendance to testify before the defence and third party closed their cases.
- [89] Counsel's explanation is extraordinary. However, I rejected the suggestion that the plaintiff made a tactical or strategic decision not to call evidence. The plaintiff's case contained a gaping hole and I could see no basis to support the suggestion that the decision was a strategic one. If he had been aware that liability was in issue and chose not to call Ms. Gervais' evidence on the point, the plaintiff was certain to lose his claim. No right-thinking lawyer could have believed or assumed their client could, in the face of a denial of liability recover judgment absent evidence of the defendant's negligence or an agreement incorporating admissions on the point.
- [90] Thus, I accept that plaintiff's counsel may have had some expectation that liability would be admitted by the defendant/third party when submissions were made. He certainly did not turn his mind to that problem before the defendant\third party closed their cases. In the face of counsel's failure to obtain written or oral confirmation of his understanding before the trial began, I do not understand the opening statement he made at the trial.

- [91] Having considered plaintiff's counsel's flawed approach to this trial, I am nevertheless satisfied he did not deliberately or strategically elect to abandon the chance to present evidence on the liability question.
- [92] In my view, the issue that must be resolved is whether the authorities support a finding that a miscarriage of justice would probably occur if the plaintiff does not succeed on this application. He must also prove the evidence would probably change the outcome.
- [93] As I have already explained, a miscarriage of justice will not easily be found. The meaning of "miscarriage of justice" was canvassed in *Aquiline*, where N. Smith J. made the following instructive comments:
- [9] The question before me, then, is whether it would be a miscarriage of justice to allow my previous order to stand. The term "miscarriage of justice" is one that is frequently used but not often defined. Black's Law Dictionary, 8th ed. (West Group, 2004) defines it as "a grossly unfair outcome in a judicial proceeding". In *Lin v. Tang* (1997), 147 D.L.R. (4th) 577, 37 B.C.L.R. (3d) 325 (C.A.) [Lin], Huddart J.A. said:

Miscarriage of justice is a difficult concept. It is not simply unfairness as viewed by the party who perceives himself the victim of an unfair process. (¶61).

Later in her reasons, her ladyship said:

In my view, miscarriage of justice means that which is not justice according to law. A miscarriage of justice will almost always be procedural. The blemish must be such as to make the judicial procedure not a judicial procedure at all. (¶64).

In making the latter statement, Huddart J.A. relied on *Robbins v. National Trust Co.*, [1927] 2 D.L.R. 97 (P.C.), where the term was defined as "such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all". (¶7).

- [10] *Lin* was a case involving an application to re-open a summary judgment that had been pronounced following a hearing at which the defendant did not appear. In considering whether a miscarriage of justice had taken place, Huddart J.A. applied an objective test based on how the result would be viewed by "a reasonable, well-informed member of the public". (¶ 69).
- [11] In the Ontario case of *1307347 Ontario Ltd. V. 1243058 Ontario Ltd.*, [2001] O.J. No. 257 (Sup. Ct.), Nordheimer J. said at ¶9:

[A] miscarriage of justice involves more than just a finding that a different result might have occurred. It involves a finding that, absent the reopening of the matter and the reversal of the original determination, a fraud would be perpetrated or the giving of perjured evidence or the deliberate misleading of the Court would be countenanced

- [94] The applicant concedes that he must prove on the balance of probabilities a miscarriage of justice will happen if the trial is not reopened and that the new evidence would "probably" change the result.
- [95] In this case, the evidence the plaintiff wishes to lead will be necessary if the plaintiff is to establish Mr. Swartz's liability for the collision. If new evidence is not permitted, the plaintiff concedes he will not likely have discharged his burden of proving negligence.
- [96] The current application is unlike others referred to in the third party and defendant's submissions, many of which involve situations where judgments had already been given (see e.g., *Moradkhan*).

If the case is not reopened, will there be a probable miscarriage of justice?

- [97] In my view, the context and facts in which the plaintiff's decision to proceed without evidence as to liability are substantially different than other cases cited by the defendant and third party. In this case, the plaintiff's error - and the absence of essential evidence - resulted from a misapprehension concerning an agreement between the parties. Judgment has not been given, the failure to call the evidence was not strategic, the plaintiff's case cannot succeed without more evidence, the proposed evidence does not involve revisiting any evidence presented as part of the plaintiff's case, and the evidence concerns liability alone.
- [98] Although counsel was negligent, judgment has not been delivered and I find that the first branch of the test is met: Permitting the plaintiff to reopen his case at this time would avoid a miscarriage of justice if the test has otherwise been met by the plaintiff. Overall, I am satisfied that allowing the plaintiff to reopen his case would not likely cause any significant prejudice to the defendant or third party, and I am satisfied that any resulting prejudice could be addressed by way of costs.
- [99] To some extent, this case bears some similarity to the issues addressed in *Kostecki v. Li*, 2013 BCSC 2451 [Kostecki] in which Justice Schultes permitted the defendant to reopen his case to elicit evidence concerning statements made by the plaintiff to a doctor whose opinion had been tendered. In that case, counsel had failed to question the doctor on information he received from the plaintiff that formed the basis of his opinion.
- [100] In *Kostecki*, judgment had not been given and the plaintiff's arguments had been made but not responded to - the court noted that "discretion is exercised much more readily prior to judgment" (para. 18). The court considered that the relevance of the proposed evidence was important and concluded that absent the doctor's evidence there would be great prejudice to the defendant. Without his further testimony the defendant would not have established the factual basis for the doctor's opinion. The court noted that the failure to call the doctor was a simple mistake by counsel who failed to grasp the limited evidentiary value of the report standing alone.

[101] Justice Schultes also noted that when the proposed evidence comes from defendant, it is less likely to be prejudicial than when a plaintiff seeks to reopen. He concluded that prejudice to the plaintiff was minimal or nonexistent; the only loss was the tactical benefit that would otherwise result from a slip-up by opposing counsel. He concluded that the importance of having the doctor's evidence was critical to the issue of credibility; without this, a miscarriage of justice might result.

Would the new evidence probably change the result of the trial?

[102] Before permitting a reopening of the plaintiff's case, I must be satisfied not only that failing to do so would cause a miscarriage of justice, but also that the testimony of Ms. Gervais as set out in the questions and answers to her November 29, 2017 and March 7, 2022 discoveries would be likely to change the result of the trial.

[103] For the plaintiff to succeed, he must satisfy the court that if the evidence is admitted, it would probably affect the outcome of the trial.

[104] Ordinarily he must also demonstrate that the evidence was not available through the exercise of due diligence before or during the trial: Cowichan Valley at para. 13. On this latter point, however, I am satisfied that the availability of the evidence from the beginning of the trial is not a basis for refusing the order because of the nature of counsel's misapprehension and error that are at the heart of his application. However, I must nonetheless be satisfied that the evidence from Ms. Gervais would probably affect the outcome.

[105] The plaintiff contends that I can infer Mr. Swartz's negligence from the fact that this was a single car accident, as cars do not leave a roadway without some negligence on the part of the driver. If the defendant is *prima facie* negligent, the defendant and third parties would be called upon to lead evidence to displace the inference. The plaintiff says there was no possible cause for the vehicle leaving the road and ending up upside down other than Mr. Swartz's negligence. He argues the testimony of Ms. Gervais will be sufficient for the court to find that Mr. Swartz's negligence was a *prima facie* cause of the accident.

[106] By contrast, the defendant and third party contend that Ms. Gervais' evidence will not assist the plaintiff in proving negligence on the part of the defendant. They contend that the plaintiff, in effect, relies on *res ipsa loquitur* in his analysis and in the circumstances of this case there can be no inference of negligence based on Ms. Gervais' observations.

[107] In order for the plaintiff to succeed, I must be satisfied that the evidence expected from Ms. Gervais would probably justify an inference the defendant breached his duty of care to the plaintiff in driving the car. The narrow question is whether Ms. Gervais' testimony contains some evidence to raise a *prima facie* case of negligence against the defendant.

[108] It is expected that Ms. Gervais will confirm that she was the owner of a motor vehicle involved in the accident in which the plaintiff was injured and Mr. Swartz was killed. Ms. Gervais' evidence was punctuated with some uncertainty and a flawed memory, as the following exchange demonstrates:

Q. And prior to the accident, you were proceeding southbound on Sutil Point Road.

A. Yes

Q. When the vehicle left the roadway, it rolled and came to rest upside down in a ditch?

A. That's my understanding.

Q. And your further understanding is that Mr. Swartz died of his injuries sustained in the incident;

A. Yes

Q. You had another passenger with you that day, Charles Cox?

A. Yes

Q. Do you have any recollection of the vehicle actually leaving the roadway? The last thing you remember is the "Oh Shit?"

A. Oh shit

Q. Then what's your next clear memory?

A. Coming to.

Q. Did you say coming to?

A. Yes

Q. And you were still in the vehicle?

A. Yes

Q Okay. So prior to the accident occurring, you were just driving along in the vehicle, and then you described how Mr. Swartz said "Oh, shit," and the vehicle left the road; correct?

A Yeah. "Oh, shit", and then I - - I'm in the car, and its upside down, and I don't know where - - what happened. It's, "Oh, shit." It's - - yeah. There's no sounds; there's no nothing. It's just during the accident. That's - - yeah

Q. So prior to that, was there anything going on in the vehicle that was unusual?

A. No. Not that I remember.

- [109] From these responses, it is not clear what side of the road Ms. Gervais' vehicle came to rest. Although Ms. Gervais answered questions about the car leaving the road, some of her answers suggest she had no memory of the car leaving the road. Her memory seems to end with Mr. Swartz's exclamation of "Oh, shit". She confirmed the car was on the proper side of the road proceeding southbound before the accident, and that it rolled and came to rest upside down in a ditch, although it is not clear on which side of the road.
- [110] In summary, Ms. Gervais could not say how the accident happened. Her evidence on this point and others in her discovery were based on her "understanding" that Mr. Swartz was driving her vehicle along Sutil Road on Cortes Island at a point where the road curved to the right, and the vehicle went off the side of the road. The curve was sharp and intersected by another road, possibly Highfield Road. Just before the accident happened, she had no memory of the activities or condition of the occupants. All she could remember was Mr. Swartz saying "Oh shit", and then she remembered "coming to" while still in the vehicle.
- [111] In order to allow the application to reopen, I must be satisfied that Ms. Gervais' recollection of these events provides some evidence of facts from which I can infer that the defendant breached his duty of care to the occupants of the car when it left the road.
- [112] I am unable to conclude that Ms. Gervais' report of the incident discloses any facts that would prima facie establish either defendant's negligence. On the contrary, I find that Mr. Swartz's utterance of "Oh shit" is equally suggestive of something appearing on the roadway unexpectedly, some condition of the roadway causing the vehicle to leave the surface, an animal on the roadway, or excessive speed resulting in him losing control.
- [113] This is unlike many of the cases cited in which evidence existed about a driver's pre-accident behaviour' for example cases of drivers having consumed alcohol or drugs, driving at too high a speed, or failing to drive to the conditions of roadway.
- [114] For the plaintiffs to succeed, there must be some evidence relating to his driving that is prima facie evidence of negligence; this evidence must be something other than the collision happening on the side of the road.
- [115] It is not necessary for me to decide the liability question based on this evidence; I am merely required to determine whether the proposed testimony from Ms. Gervais would constitute a fact from which I could infer prima facie negligence.
- [116] There was no evidence from police officers, ambulance attendants, or other bystanders concerning details such as skid marks, road conditions, tires, mechanical functioning of the car, weather (other than the sunset), or the physical condition of Mr. Swartz. There was no accident reconstruction evidence concerning speed estimates. Photographs of a vehicle were included in the plaintiff's exhibit book but never dealt with by any witnesses including Ms. Gervais.

[117] Accepting the anticipated testimony of Ms. Gervais as disclosed in her answers at examinations for discovery, I cannot conclude there was prima facie evidence of Mr. Swartz's negligence or evidence from which I could draw an inference concerning his prima facie negligence. The vehicle he was driving was found upside down near the travelled portion of the roadway. The only fact that can be gleaned from Ms. Gervais' evidence is that Mr. Swartz was travelling in the proper lane of the road, travelling around a reasonably sharp curve, when something caused him to exclaim "Oh, Shit".

[118] I find the comments in *Singh v. Chand*, 2019 BCSC 932 instructive on this point:

[138] This fact situation is akin to the circumstances in *Haswell*, where there was a void in the evidence that explained the collision and several possibilities as to what occurred which resulted in various views as to who, if anyone, was liable. The comments of Davey J.A., for the court of appeal, although set out above are repeated here with my emphasis:

Here it is a case, not so much of the probabilities being evenly divided, as an absence of evidence concerning the events causing the accident. It is one thing to assess the probabilities on sketchy evidence covering the whole of the accident, but another thing to attempt to draw inferences and assess the probabilities when the evidence shows that the important matters are not before the Court. To attempt to determine the cause of the collision and the several or combined responsibility of the parties under those circumstances would be to substitute speculation and conjecture for inference. In my respectful opinion, considering the state of the evidence, the reasoning employed by the learned trial Judge is supported by the judgment of the Supreme Court of Canada in *Wotta v. Haliburton Oil Well Cementing Co.*, [[1955] S.C.R. 377], and the claim and counterclaim were properly dismissed because neither party discharged the burden resting upon him to prove negligence.

[Emphasis in original.]

[119] In many cases cited by the parties, the inference of negligence stems from some evidence concerning the drivers actions, sobriety, or breaches of the motor vehicle legislation. For example, in *T.S. v. Gough*, 2022 BCSC 264 at para. 26, there was evidence that the driver had been drinking before crossing over the center line directly into oncoming traffic and coming to rest in the southbound lane. The trial judge said that the drivers intoxication supported "an inference of negligence". There was no other explanation for the accident in the circumstances.

[120] A similar conclusion was reached in *Jacobs v. Basil*, 2017 BCSC 1339 in which Abrioux J. (as he then was) made a finding that a plaintiff had established a prima facie case of negligence that the defendant "smelled of alcohol and was intoxicated".

[121] In *Fontaine*, Major J. articulated the challenge in cases involving cars leaving a proper lane of travel - namely, that the availability of an inference of negligence necessarily depends on the specific facts of the case:

35 The appellant submitted that an inference of negligence should be drawn whenever a vehicle leaves the roadway in a single-vehicle accident. This bald proposition ignores the fact that whether an inference of negligence can be drawn is highly dependent upon the circumstances of each case: see *Gauthier & Co.*, supra, at p. 150. The position advanced by the appellant would virtually subject the defendant to strict liability in cases such as the present one.

[122] This principle was discussed further in *Benoit v. Farrell Estate*, 2004 BCCA 348 [Benoit]:

[76] Major J. pointed out, at para. 35, that to infer negligence whenever a vehicle leaves its proper lane of travel without regard to the other circumstances would virtually subject drivers of such vehicles to strict liability.

[77] The question whether negligence should be inferred when a motor vehicle has left its proper lane of travel usually arises in cases, like *Fontaine*, where the driver of the vehicle is sued by a plaintiff injured in the accident. In such cases, the plaintiff bears the burden of proof. The inference that a vehicle does not normally leave its proper lane in the absence of negligence by its operator may afford a *prima facie* case but, if the defendant driver produces a reasonable explanation that is as consistent with no negligence as with negligence, the inference will be neutralized: see paras. 23-24.

[123] The burden of proving the defendant's negligence remains with the plaintiff and the plaintiff's claim may fail even though the defendant is not able to explain precisely how the accident occurred. In other words, the defence's burden is to prove how the accident may have occurred, rather than how it did occur; this may be done by offering possible explanations of how the accident could have occurred without negligence: see *Singleton v. Morris*, 2010 BCCA 48 at paras. 34, 38.

[124] The tension in this application arises from the plaintiff's obligation to establish that admitting Ms. Gervais' evidence would "probably" alter the result.

[125] Recognizing the significant impact on Mr. Cox's claim, I must consider the test, which asks whether Ms. Gervais' evidence would probably change the result if she is allowed to testify. In my view, the evidence--and the absence of evidence--persuade me that the inference of negligence would, in either case, be available on the proven facts.

[126] In this case, I must be satisfied on the balance of probabilities that there is evidence based on the discovery evidence of Mr. Gervais from which I might infer that Mr. Swartz's driving breached his duty of care to Mr. Cox.

[127] In this analysis, I will assume that the bulk of Ms. Gervais' testimony is true and, if so, whether I infer from it that Mr. Swartz was negligent. If I am able to accept that her recollection of events is evidence of a *prima facie* breach of his duty of care, I would conclude that her testimony would likely change the result. Nevertheless, the result would only change after the defence had an opportunity to explain how the accident happened without the driver's negligence.

- [128] As I have observed, there is no indication in Ms. Gervais' evidence from which an inference of negligence could be made other than simply inferring negligence from the fact that the car left the road without any other explanation.
- [129] Based on all of Ms. Gervais' evidence, I am unable to conclude that anything points to Mr. Swartz's negligence except for the happening of the accident itself. More importantly, Mr. Swartz's exclamation before the accident suggests a number of equally plausible inferences, including the presence of some unanticipated person, animal, or object suddenly and unexpectedly appearing in his pathway. Nothing said by Ms. Gervais points to Mr. Swartz's negligence.
- [130] In short, this case is unlike Benoit because there is no evidence from which I infer Mr. Swartz's negligent driving causing or contributing to the accident. Even if the inference were available, I am satisfied that it, in the circumstances of this case, it would be "neutralized" by the availability of other explanations that are equally consistent with his utterance before the accident that could signal an absence of negligence on his part: Benoit at para. 77.
- [131] In the result, I am unable to find that Ms. Gervais' evidence raises a prima facie inference that Mr. Swartz's negligence caused the collision. Conversely, Mr. Swartz's exclamation of "Oh Shit" is some evidence from which I infer something happened that was startling and unexpected. I also infer that whatever happened in front of him and resulted in his outburst may have been the cause of the accident. While it is possible that his exclamation was a response to his loss of control of the vehicle, there is no evidence that could reliably inform such an inference.

Disposition

- [132] The plaintiff has not established on the balance of probabilities that Ms. Gervais's testimony would change the result in the outcome of this case.
- [133] On this basis, the plaintiff's application is dismissed.

"Armstrong J."

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