
CANADA / JUDGMENT

Demello v. Chaput

2012 BCSC 1964

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1964 Demello v. Chaput

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Demello v. Chaput,

2012 BCSC 1964

Date: 20121010

Docket: M106102

Registry: Vancouver

Between:

Michael Louis Demello

Plaintiff

And

Shawn Rheal Chaput

Defendant

- and -

Docket: M112764

Registry: Vancouver

Between:

Michael Louis Demello

Plaintiff

And

Hyunjin Han

Defendant

- and -

Docket: M121654

Registry: Vancouver

Between:

Michael Louis Demello

Plaintiff

And

Diane Marie Simpson and Fariborz Saffari

Defendants

Before: The Honourable Madam Justice Maisonville

Oral Ruling on Mistrial Application

Counsel for the Plaintiff:

V.J. LeBlanc

Counsel for the Defendants:

C. York and J. Locke

Place and Date of Hearing:

Vancouver, B.C.

October 10, 2012

Place and Date of Judgment:

Vancouver, B.C.

October 10, 2012

I. Introduction

- [1] THE COURT: This is an application for a mistrial or, alternatively, for the discharge of the jury brought by the defendants in this matter following remarks made by plaintiff's counsel during the course of his opening. Plaintiff's counsel had filed a jury notice on these three actions which are being tried together.

- [2] Two things were mentioned of concern for the defence. As well, there is mention that there was an inappropriate reference to the plaintiff by his first name.
- [3] The two matters of most concern, however, were that the plaintiff referred to the pleadings in the course of his opening to say that liability had not been admitted until last week.
- [4] The second matter concerns the following remarks made by plaintiff's counsel during the course of the opening. He stated:

His wife is pregnant during this period of time. She'd like a little bit more support. He's not able to give that to her. In July, Michael was supposed to do a number of things in anticipation of having some friends over, July of 2012, and at that point his wife was pregnant with her third child. He didn't get around to doing it. Out of frustration, she did it herself. She did all the work he was supposed to do that day in addition to getting the house ready for a party that they were having. They were having some friends over. She started bleeding and two weeks later she has a miscarriage. Now, whether or not or what caused the miscarriage is not the point here. The point is that she blamed Michael for that, so you can see that's an obvious point of tension.

Counsel then went on to discuss another area.

II. The Position of the Parties

- [5] Counsel for the defence argues that the remarks are inappropriate, inflammatory, and designed to cause sympathy in favour of the plaintiff. As well, counsel for the defence argues that by referencing the pleadings in the fashion that plaintiff's counsel did in opening, to say that liability was only admitted last week, has the implication that the plaintiff has been put to work and prejudiced, and thus is also grounds for a mistrial or, alternatively, discharging the jury.
- [6] Counsel for Mr. Demello stated that he had endeavoured to state in his opening that he was not suggesting that anything that happened to Mr. Demello caused the miscarriage. The evidence would be relevant, counsel for Mr. Demello argues, as it would go to the anxiety level and guilt felt by Mr. Demello. That goes to general damages, it is argued. It arose from his inability to do his share of the work. He argues that the miscarriage likely arose from her doing physical work but that is not connected to the accident.

III. The Governing Rule

- [7] In situations involving comments alleged to reach the threshold of misconduct, the governing rule is as set out in the B.C. Supreme Court Rules, B.C. Reg. 168/2009, Rule 12-6(12):

[The] trial may continue without jury

- [12] If, by reason of the misconduct of a party or the party's lawyer, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose lawyer's conduct, is complained of, may continue the trial without a jury.
- [8] I pause to note that the decision of our Court of Appeal, in *Birkan v. Barnes*, [1992] 69 B.C.L.R. (2nd) 132, that misconduct is not limited to deliberate wrongdoing and may arise innocently and unintentionally.
- [9] The issues before the court are whether the remarks are inappropriate or inflammatory. If so, should this cause this court to discharge the jury and declare a mistrial? Or if the court finds that, alternatively, the remarks are inflammatory and inappropriate, in the alternative can any remark be corrected by an instruction to the jury?
- [10] I start with the purpose of an opening.
- [11] The purpose of an opening was set out by the Ontario Superior Court of Justice in *Baillargeon v. Paul Revere Life*, [2006] O.J. No. 2246, in which Ducharme J. for the Court quoted from Mr. Justice Sopinka in his seminal text, the text "The Trial of an Action", 2nd ed., in which he stated:

The object of an opening is to give the court a general notion of what will be given in evidence. In his opening, counsel states what he submits are the issues and the questions between the parties which have to be determined, what are the facts of the case, the substance of the evidence he has to adduce and its effect on proving his case, and he will refer to the relevant correspondence between the parties and other documents but the opening is not the occasion for detailed argument on legal questions.

- [12] Mr. Justice Ducharme continues:

As *Brochu v. Pond* [[2002] 62 O.R. (3d) 722] makes clear, restrictions apply to both opening and closing addresses, and the constraints upon an opening address are greater than those upon a closing address where counsel are afforded considerably more latitude. In contrast to the closing address, the opening has the more limited and narrow function of defining the issues in the case and outlining those facts that will be adduced to establish the allegations advanced by the party. Moreover, as Madam Justice Cronk noted at para. 16 of *Brochu v. Pond*:

[C]omments to a jury which impede the objective consideration of the evidence by the jurors, and which encourage assessment based on emotion are objectionable at any time. Such comments are inflammatory, in the sense that they appeal to the emotions of the jurors and invite prohibited reasoning.

- [13] These comments were considered by our Court of Appeal in *Brophy v. Hutchinson*, 2003 BCCA 21.

[14] What is inappropriate has been considered in many instances. A court should be reluctant to discharge the jury but should do so where it finds that there has been an inappropriate remark made in a context where it cannot be remedied to dispel any sympathy or prejudice.

[15] Suitable remedies for inappropriate remarks were examined in the case of *Martin Estate v. Pacific Western Airlines Ltd.* (1981), 24 C.P.C. 237. In that case, Trainor J. considered the issue as to whether the court could dispel from the minds of the jurors the inappropriate remarks. He did not see, in the circumstances of the case before him, how that could be done. In that case, objection was taken to the opening remarks immediately by counsel. The remarks complained of included:

... This will not be a long trial, because the defendant has admitted liability. But in terms of our community, and in terms of the family, we have to ensure that no wrongdoer who causes death should have to pay less than full compensation. This is what we are asking on behalf of the widow and the children, and on behalf of this community, and in the hope that this sort of thing will never occur again.

And later:

... it is only fair that in determining the question of compensation, that there should be a measure of anger".

[16] In that case, Trainor J. discharged the jury and declared a mistrial.

[17] This case was considered by our Court of Appeal in *Cleeve v. Gregerson*, 2009 BCCA 2, where the court, in the reasons set out by Kirkpatrick J.A., held that a heavy onus exists on the party seeking to establish that:

... the prejudice is so great that it cannot be remedied by the court. Ultimately, the trial judge must be of the opinion that the comments or conduct in issue caused a substantial wrong or miscarriage of justice, so that it would be unfair to continue with the present jury.

[18] Kirkpatrick J.A. cited *Hamstra v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, 34 B.C.L.R. (3d) 10. She continued, at para. 43:

The question is whether the particular jury, in the particular circumstances of the case, will be able to dispel the matters of concern from their minds.

[19] She cites further *Martin Estate* and *Schram v. Osten*, 2004 BCSC 1789, 33 B.C.L.R. (4th) 336:

In other words, the trial judge must determine that she or he cannot disabuse the minds of the jury in regards to the inflammatory remarks made by counsel.

[20] *Martin Estate* is again cited, as is *Birkan v. Barnes* (1992), 69 B.C.L.R. (2d) 132, 93 D.L.R. (4th) 392 (C.A.), and *McLachlan v. Hamon*, 2001 BCSC 1679. The court noted the comments in *Brophy*, at para. 47:

In an opening statement, counsel may not give his ... personal opinion[s] of the case. Before any evidence is given he may not mention facts which require proof, which cannot be proven by evidence from his own witnesses, or which he expects to elicit only on cross-examination. He may not mention matters that are irrelevant to the case. He must not make prejudicial remarks tending to arouse hostility, or statements that appeal to the jurors' emotions, rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision and the like is impermissible .

[21] At para. 49, she states:

It has been noted, however, that counsel is afforded more latitude in the closing address to the jury, as compared with the opening address. As explained in *Brochu v. Pond* at para. 17:

Within those general constraints, however, and in contrast to [an] opening address [sic] to a jury, counsel is afforded considerable latitude in a closing address ...

And Sopinka J.'s text is cited for that proposition.

[22] I pause to note and underscore that what is before the court is the opening comments and not the closing comments, and consequently the court must apply the scrutiny suggested by the courts with respect to an opening address.

[23] I also refer to *James v. White*, [1999] B.C.J. No. 2058 (S.C.), a 1999 decision of the Victoria Registry, where the opening remarks included a comment by counsel that he had "gotten to know" the plaintiff and the jury would get to know the Plaintiff and the first name was used. Cowan J. discharged the jury and declared a mistrial. See also the case of *de Araujo v. Read*, 2004 BCCA 267, where the plaintiff was referred to in the first name. Here, too, the adult plaintiff, as noted above, is referred to by his first name. The court found that that was an inappropriate practice at para. 11, where Thackray J.A. for the majority of the court stated:

Plaintiff's counsel, while inappropriately referring to the plaintiff as "Estela", then said, "we are here today to ask for your help. We are in this together... Estela would much rather have had the defendant accept responsibility" and allow her to have her life as it was before the accident. "We are here because he has not done that." The fact is that the defendant admitted liability. The defendant was negligent and his negligence caused injuries to the plaintiff. He admitted to this and nothing more was required of him.

I note in the case at bar there is the similar circumstance that liability has been admitted now on all of the accidents.

[24] Respecting an instruction to the jury to correct this, the submissions of the parties, firstly by the defence, were that the court must examine the decision in *R.K. (Litigation Guardian) v. B.R.* (2010), 9 B.C.L.R. (5th) 378 of N. Brown J. He considered the impact of an instruction to the jury to disregard a comment as follows at para. 24:

While instructions to the jury may suffice, they can also further prejudice a party, especially when the jury has heard several improper statements during a short submission. As noted in *Aberdeen v. Langley (Township)*, 2006 BCSC 2062 at paras. 44 and 45, further instructions saying that the jury should ignore certain statements can, through repetition of them, magnify the statements and enhance their prejudicial effect. Conversely, instructions to the jury to disregard all of counsel's submissions could "create a negative cloud" over the plaintiff, thus tipping the scales too far in the opposite direction. I am particularly concerned about the effect of instructions to the jury in the instant case because in my view I could not sufficiently address the prejudicial nature of the statements about the defendant remaining in the courtroom without drawing the jury's attention to the correspondence between counsel.

[25] I also refer to the decisions that were cited of *Morrison v. Greig* 2006 CanLII 34556 (ON SC) and *de Araujo*.

[26] Counsel for the plaintiff argued that the basis for the comments were marital difficulties. It was argued by Mr. LeBlanc that the aspects of the opening are akin to the cases that he cited of *Zhong v. Ao* 1997 CanLII 2709 (BC SC) and *Holman v. Martin* 1995 CanLII 9103 (AB QB)30, *Alta LR (3d) 378*. I note in those cases the injuries sustained were head injury cases and in one instance his wife had left him as a consequence of his changed personality. Similarly, in *Holman*, the plaintiff was introverted and withdrawn. The relationship between the plaintiff and his partner had lost its intimacy and he obviously suffered. I note that those situations are fundamentally different from the situation before the bar. In referring to bleeding and to the miscarriage, there is no escaping the inference to be drawn, and that is that the accident ultimately led to the miscarriage.

[27] At page 3 of his written submissions, counsel for the plaintiff stated that

The jury cannot have failed to understand what counsel is saying in the impugned remarks was that the evidence would show that Mr. Demello's injuries were the cause of his failure to do the tasks he was supposed to do, that his wife did them instead, and that later she suffered a miscarriage for which she blamed him.

[28] Mr. LeBlanc suggests that the appropriate remedy for the remarks, should the court find them to be improper or inflammatory, would be as follows:

You must understand that Mr. Demello is not claiming any injuries he may have sustained in these accidents have caused or were in any way responsible for the miscarriage. There will be no evidence led to support such a position and it would be improper for you to draw any such conclusion.

If Mrs. Demello testifies she had a miscarriage and that she blamed Mr. Demello for it, you may not consider that testimony as evidence that his actions did in fact cause the miscarriage.

After having considered all the evidence, you may decide that Mrs. Demello did suffer a miscarriage and did blame Mr. Demello for it. If you do so decide, these facts are relevant only to the extent that they may show the effect, if any, that any injuries Mr. Demello may have suffered had on their relationship. This is what Mr. LeBlanc meant when he said "The cause of the miscarriage is not the point, the point is that she blamed Michael for the miscarriage."

- [29] I find that the first paragraph of that comment underscores what should not be done in an opening. There should be no reference to irrelevant or inadmissible evidence. In the proposed remedy itself, it is stated "There will be no evidence led to support such a position and it would be improper for you to draw any such conclusion." That being the case, it appears on the face of it that plaintiff's counsel concedes that the proposed evidence is not going to be led in such a way and that it would be improper to infer a chain of circumstances, and that the defendants were responsible for that.
- [30] I find that in the circumstances of the comments as they were made yesterday, it would be impossible to dispel the chain of reasoning that the accident ultimately led to the miscarriage. To make a further comment would underscore that, and, as noted in the above cases, it would be impossible to effect a correction without drawing attention to the problem and refer to what is not going to be led in evidence.
- [31] I do not find that this is the same as the circumstances in the cases *Zhong v. Ao* and *Holman v. Martin*, which were not jury trials. I do not find that the remarks are appropriate for an opening, and rather that they are inappropriate and inflammatory and appear designed to have evoked sympathy, and that it would be impossible to craft an instruction to the jury that would be able to dispel that possible sympathy to the jury. As noted, as well, that there were similar objections to references to the position of the defendant respecting liability which cause concern.
- [32] The remarks in relation to the miscarriage were sufficient to cause this court grave concerns such that I am going to direct that the jury be discharged. While I find that those remarks are questionable, I am not going to comment on them in these reasons as it is not necessary for me to do so. I do note that the reference to the plaintiff by his first name is considered inappropriate and has been considered so by both the Ontario courts and by the Court of Appeal.
- [33] In all of the circumstances, I order that the jury in this matter be discharged.
- [34] I note that, pursuant to the provisions of Rule 12, that counsel for the defendant submits that the matter can proceed judge alone. In the circumstances, I am going to order that the matter carry on as a judge alone trial.

"Maisonville J."

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