
CANADA / JUDGMENT

Gibson v. ICBC

2013 BCCA 557

COURT

British Columbia Court of Appeal

DECIDED

23 December 2013

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2013 BCCA 557 Gibson v. ICBC

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gibson v. ICBC,

2013 BCCA 557

Date: 20131223

Docket: CA039543

Between:

Peter Robert Gibson

Appellant

(Plaintiff)

And

Insurance Corporation of British Columbia

Respondent

(Defendant)

And

Heather Bradshaw also known as Heather Sawicki,

and Darryl Sawicki

Respondents

(Defendants)

And

Zoltan Sandli

Respondent

(Defendant)

Corrected Judgment: Text on the title page of the judgment was corrected on December 30, 2013.

Before:

The Honourable Mr. Justice Low

The Honourable Mr. Justice Hinkson

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated November 21, 2011 (Gibson v. ICBC, Vancouver Docket S032715).

Counsel for the Appellant:

Robert B. McNeney

Counsel for the Respondent Insurance Corporation of British Columbia:

T. Goepel

Counsel for the Respondent Zoltan Sandli:

H. Rubin, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

October 30, 2013

Place and Date of Judgment:

Vancouver, British Columbia

December 23, 2013

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Mr. Justice Hinkson

The Honourable Mr. Justice Harris

Summary:

The appellant brought an action against ICBC for injuries he sustained when a motor vehicle struck his motorcycle and its driver did not remain at the scene of the collision. Five years later, ICBC believed it had identified the driver and sought an order under s. 24(6) of the Insurance (Vehicle) Act that the driver and owner be substituted for it as defendants. The appellant wanted to add the alleged driver and owner but leave ICBC as a defendant so he could plead in the alternative. He did not accept that ICBC had identified the driver and owner of the vehicle that struck his motorcycle. ICBC's application was for a summary trial of the identity issue. The appellant contended that the identity issue could not justly be resolved without a conventional trial as there was a significant conflict in the evidence. Held, the appeal is allowed and the matter is to be retried conventionally. The trial judge did not address the argument of the appellant that it was not appropriate to determine the identity issue by summary trial. The argument was sound. The conflict in the evidence could not be resolved summarily. In addition, the trial judge did not resolve the evidentiary conflict. He determined that the intended defendant was the driver of the vehicle that struck the motorcycle without discussing the weaknesses in that evidence and without discussing the evidence to the contrary.

Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] This is an appeal of an order substituting Heather Bradshaw (formerly Heather Sawicki) and Darryl Sawicki as defendants in the action in the place of the Insurance Corporation of British Columbia ("ICBC"), and dismissing the action as against ICBC. The latter provision in the order was made pursuant to s. 24(6) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act].
- [2] Section 24(1) of the Act permits a person suffering bodily injury in a motor vehicle collision to bring an action for damages against ICBC "as nominal defendant" when "the names of both the owner and the driver of the vehicle are not ascertainable". The appellant brought an action against ICBC under this section.

- [3] Section 24(6) reads:

If the identity of the unknown owner or driver is ascertained before judgment is granted in an action against the insurer as nominal defendant, then, despite the limitation period in the Motor Vehicle Act, that owner or driver must be added as a defendant in the action in substitution for the corporation, subject to the conditions the court may specify.

- [4] It is the appellant's position that it was necessary to add Ms. Bradshaw and Mr. Sawicki as defendants but that ICBC should have remained as a defendant in the action. The appellant says that the issue as to the identity of both the driver and owner of the motor vehicle that struck his motorcycle on 24 May 2002 should not have been determined summarily but should be tried conventionally.

- [5] I agree with the position of the appellant. There is evidence that Heather Bradshaw was the driver of a vehicle owned by Darryl Sawicki and that the Sawicki vehicle collided with the appellant's motorcycle. However, this evidence is disputed by the evidence of the appellant. The extent of the conflict in the evidence makes it inappropriate to decide the issue on a summary basis. A conventional trial is necessary to resolve the central conflict in the evidence.
- [6] There is no requirement in s. 24(6) of the Act for the identity issue to be decided summarily. There is no reason under the Act that the issue must be resolved in advance of resolution of all other issues in the action. Nor is there any requirement under the Act that the people ICBC alleges are the driver and owner cannot be added as parties with ICBC remaining as a defendant. If identity remains a litigable issue, the plaintiff should not be precluded from pleading in the alternative. Such is the case here.
- [7] This litigation has a lengthy and unusual history. I will summarize it before discussing the applications that led to the order under appeal.
- [8] The motor vehicle collision giving rise to the action occurred on 24 May 2002, more than eleven years ago. There is no dispute that, while riding his motorcycle on a street, the appellant was struck by a motor vehicle and suffered personal injury.
- [9] The appellant brought the action against ICBC on 21 May 2003. ICBC defended the action on all issues and the case proceeded to trial. At trial, ICBC accepted liability under s. 24, leaving only damages to be assessed. On 8 March 2007, the trial judge gave oral reasons assessing damages in an amount in excess of \$100,000. The appellant appealed the damage award.
- [10] On 10 May 2007, before entry of the trial judgment, ICBC received, from an anonymous source, information as to the identity of the driver and owner of the vehicle that collided with the appellant's motorcycle. In an interview on 29 May 2007, the respondent Heather Bradshaw told an agent of ICBC that she was that driver. She said she drove a vehicle owned by, and registered to, Darryl Sawicki.
- [11] On the basis of this fresh information, ICBC applied to the trial judge to withdraw its admission of liability. The judge dismissed the application on 13 December 2007 (2007 BCSC 1843).
- [12] On 24 April 2008, at the hearing of the appeal of the damages award, ICBC sought leave to appeal the dismissal by the trial judge of its application to withdraw its formal admission of liability. This court allowed the plaintiff's appeal and ordered a new trial on the basis that the damages award was not supported by reasons sufficient for appellate review. The court stated that the intended appeal by ICBC of the order refusing withdrawal of the admission of liability thereby became moot. The court's reasons are indexed at 2008 BCCA 217.

- [13] On 4 August 2010, a master determined that withdrawal of the admission of liability was no longer necessary. ICBC's admission was only for the purpose of the trial and, based on cited authority, the ordering of a new trial by this court reinstated the pleading denying liability. No appeal was taken of that ruling.
- [14] The master also granted ICBC leave to amend its defence, to bring a counterclaim against the appellant and to join Zoltan Sandli as a defendant in the counterclaim. No issue in the counterclaim is before us, but in it ICBC seeks from the appellant and Mr. Sandli damages for a fraudulent conspiracy to misrepresent the collision as a hit-and-run.
- [15] The appellant and ICBC brought cross applications that led to the order under appeal.
- [16] The appellant applied for an order adding Bradshaw/Sawicki as defendants "in view of the position taken by [ICBC] in this litigation that Heather [Bradshaw] was the driver of the vehicle that struck the plaintiff" and that "Darryl Sawicki was the owner of the alleged vehicle" (my emphasis). The appellant specified in his application that he wanted ICBC to remain as a defendant "against the event that his claims against [Bradshaw/Sawicki] are dismissed." As I have said, I see no reason why the appellant cannot plead in the alternative.
- [17] Since the identity issue arose, the appellant has maintained that Ms. Bradshaw was not the driver of the vehicle that struck him and that he has not been able to ascertain the identity of the driver or owner of that vehicle.
- [18] ICBC brought its application for an order removing it as a defendant and dismissing the action as against it. ICBC's application was under R. 9-7 of the Supreme Court Civil Rules for a summary trial of the issue of the identity of the driver and owner of the vehicle that caused bodily injury to the appellant. It invoked s. 24(6) of the Act cited above.
- [19] The relevant and admissible evidence on the issue of whether Heather Bradshaw was ascertained as the driver of the vehicle that struck the appellant's motorcycle consisted of affidavits sworn by the appellant and Heather Bradshaw and transcripts of the cross-examination of each affiant. Neither cross-examination was conducted before the court. This being the trial of an issue, no other affidavit evidence in the record was admissible with respect to the issue being tried, with the exception of evidence from ICBC employees as to how the allegation that Heather Bradshaw was the driver came to their attention and evidence tendered by ICBC of a statement taken from the appellant.
- [20] The affidavit of Heather Bradshaw is extremely short. It consists of fourteen paragraphs, all but one of which contains only one sentence. She swore that on the evening of the collision she was at the Sandpiper Pub in White Rock, B.C., where she met two friends, Denise Izatt and Leanne Coleman. She was introduced to a man named Pete or Peter (the appellant's given name). After midnight, she drove to "a house in Surrey" with Izatt, in a car owned by Darryl Sawicki, then her husband. On the trip, she followed Pete, who was riding a motorcycle. The motorcycle stopped and her car "made contact with the back of it". She swore that Pete waved at her and told her to leave. She left and did not report the incident to

the police or to ICBC. She did not know of the appellant's claim until ICBC contacted her years later. It was five years later.

- [21] In his affidavit, the appellant swore that he knows Ms. Izatt and Ms. Coleman but not Heather Sawicki or Heather Bradshaw. His affidavit states: "I do not know the identity of the person who collided with the rear of my motorcycle and I did not instruct anyone to leave the scene of the collision."
- [22] During cross-examination, the appellant testified that he had been at the Sandpiper Pub in the company of a number of people, including Zoltan Sandli and Ms. Coleman, who was a hostess and a singer at the pub. Later, he followed Mr. Sandli, both on their motorcycles, toward Mr. Sandli's house. The intention was to play pool but the appellant decided to go home. He was going to tell Mr. Sandli at the house of his change in plans, and then be on his way. Mr. Sandli turned down the alley behind his house and the appellant signalled to do the same. That is when his motorcycle was struck from behind.
- [23] I am unable to find in the transcript of the cross-examination of the appellant anything to question the basic assertion in his evidence that he did not know who was driving the vehicle that struck him and, more importantly, that he did not wave that driver away from the scene.
- [24] The cross-examination of Heather Bradshaw was more productive. She said that she did not remember the name of the motorcyclist until it was given to her by a representative of ICBC. The motorcyclist did not even fall off his motorcycle, there was no damage to the car and there could not have been any damage to the motorcycle. She did not even mention the incident to her husband because "(t)here never was an accident." She testified that if the motorcycle was a write-off because the frame was cracked, such damage could not have been caused by her. She could not recall what part of the car bumper collided with the motorcycle. The motorcyclist was not thrown to the ground.
- [25] In a statement to ICBC, Ms. Bradshaw named Ms. Coleman as her passenger. She later seemed to accept that her passenger was Ms. Izatt, but only because that is what she had been told.
- [26] ICBC tendered no evidence sworn by Ms. Izatt.
- [27] Contrary to what she swore in her affidavit, Ms. Bradshaw agreed in cross-examination that the motorcyclist could have been somebody other than the person identified to her as Pete (of which name she apparently has no independent recollection). She even agreed that the incident she described could have been completely separate from the one that, as the questioner put it, "brings us to court today".
- [28] The evidence of Ms. Bradshaw in many respects does not jibe with a statement given by the appellant to ICBC three days after the collision. ICBC appended that statement to an affidavit sworn by Susan Morrow, a claims adjuster. There is no suggestion that it was put into evidence other than for the truth of its contents. In his statement, the appellant said the

impact threw him into the air and he landed on the pavement. He heard a crack when his head hit the ground. Mr. Sandli returned and called for help. A fire truck, ambulance and police attended. The appellant was put on a stretcher. He could see pieces of the car's headlight all over the road. There was extensive damage to his motorcycle. The ambulance took him to the Surrey Hospital. His injuries were not insubstantial.

- [29] It would appear that the minimal impact with no damage described by Ms. Bradshaw is inconsistent with the evidence as to the damage to the motorcycle, the injuries to the appellant and the damages assessed at the first trial. I note that in her affidavit, Ms. Morrow swore that on 30 May 2002, an ICBC estimator took photographs of the motorcycle and prepared a damage estimate. Because ICBC tendered none of these documents to the court, it must be assumed that this evidence would not contradict that of the appellant about the force of the collision.
- [30] The judge heard the cross applications on 23 September 2011 and gave oral reasons on 21 November 2011.
- [31] The appellant opposed determination of the identity issue by way of summary trial. In his written submissions in the trial court, he argued that the issue was not suitable for disposition under R. 9-7. However, the judge failed to address this submission. As I have already stated, it is my opinion that the appellant's position was correct.
- [32] Under R. 9-7(11)(b), the court may "dismiss the summary trial application on the ground that the issues raised by the summary trial application are not suitable for disposition under this rule." Under R. 9-7(15), "the court may grant judgment unless the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application."
- [33] At para. 14 of his reasons, the judge commented that ICBC took no position with respect to the appellant's application to add Bradshaw/Sawicki as defendants. In fact, ICBC could not oppose that application because it wanted s. 24(6) of the Act to apply. That section could not apply if Bradshaw/Sawicki were not made substitute defendants.
- [34] The judge noted at para. 15 that "there are material differences in the description of the nature and force of the impact by the [appellant and Ms. [Bradshaw]]. However, nowhere in his reasons did he attempt to resolve that conflict. Nor did he give reasons as to why he accepted the evidence of Ms. Bradshaw or why he rejected the evidence of the appellant.
- [35] On the identity issue and the application of s. 24(6) of the Act, the judge said this:

- [21] Having reviewed the information regarding Ms. Sawicki/Bradshaw's involvement in the accident (in particular her affidavit), the application response and the comments of her counsel at this application, there is no question that at the time of the plaintiff's application to add the Sawicki's as defendants, the identity of the driver and registered owner of the vehicle that collided with the plaintiff in May 2002 had been ascertained as Heather Sawicki/Bradshaw and Darryl Sawicki, respectively.
- [22] Section 24(6) of the Insurance (Motor Vehicle) Act uses mandatory language to say in those circumstances ICBC is to be removed as a defendant and the Sawickis to be substituted.
- [36] I agree that s. 24(6) uses mandatory language. However, it is not mandatory to substitute an alleged driver and owner for ICBC until it has been admitted by the plaintiff, or otherwise has been proven, that the driver or owner has been so ascertained. In the present case, there was no admission and the evidence was in such conflict that the identity issue could not be resolved on a summary basis.
- [37] The finding of identity in para. 21 of the reasons is merely a conclusion with no analysis of the evidence to support it or of the evidence to the contrary.
- [38] In *Edward Jones v. Mirminachi*, 2011 BCCA 493, this court overturned the order of a trial judge resolving a contract dispute by summary trial. The court referenced the leading cases on R. 9-7 and its predecessor, R. 18A, as follows:
- [25] Whether to proceed summarily is a matter of discretion. This Court will not interfere with a judge's exercise of discretion unless it is clearly wrong or the judge has misapplied the law. In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, [1989] B.C.J. No. 1003 (C.A.), Chief Justice McEachern, whose reasons were concurred with by three of the other members of the five member division hearing the appeal, discussed the discretionary nature of Rule 18A of the former Rules of Court, B.C. Reg. 221/90, the predecessor to Rule 9-7. At paras. 48-49, 52 and 54, the Chief Justice explained:

48 In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

49 Because of dicta in some cases, some counsel believe the R. 18A procedure should only be invoked when both parties agree to a summary trial. I do not agree, as it must be expected in an adversarial process that parties will often disagree on the appropriateness or otherwise of the summary trial procedure. There is no room in the proper construction of R. 18A for a respondent's veto.

...

52 In my view it will be rare for a judge in chambers to be satisfied to such an extent. Anything might happen at a trial and one can never say that the result will always or inevitably be the same. If the chambers judge can find the facts, then he must give judgment as he would upon a trial unless for any proper judicial reason he has the opinion that it would be unjust to do so.

...

54 In deciding whether the case is an appropriate one for judgment under R. 18A, the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do, so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue.

[26] In his reasons (with which Mr. Justice Seaton also agreed), concurring in the result, Mr. Justice Lambert wrote at para. 69:

The key to whether a judgment should be granted under Rule 18A lies in paragraphs (a) and (b) of subrule 18A(3):

Judgment

- (3) On the hearing of the application, the court may grant judgment in favour of any party either upon an issue or generally, unless
 - (a) the court is unable on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (b) the court is of the opinion that it would be unjust to decide the issues on the application, and may impose such terms respecting enforcement of the judgment, including a stay of execution, as it thinks just, and may award costs.

The court may, but need not, grant judgment, even if the conditions in paras. (a) and (b) are met. But if those conditions are not met, judgment cannot be given.

[Emphasis added by Lambert J.A.]

[30] In *Bacchus Agents (1981) Ltd. v. Philpp[i] Dandurand Limited*, 2002 BCCA 138, 164 B.C.A.C. 300, at paras. 6-7, Southin J.A., writing for a unanimous Court with respect to a summary judgment application, warned of "litigating in slices":

This [Rule 18A] is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.

When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case - what I have often characterized as "litigating in slices" - it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

The court concluded:

- [31] Under subrule (11) of Rule 9-7 of the Supreme Court Civil Rules, a judge hearing a summary trial application may dismiss the application when it will not assist the efficient resolution of the proceeding or when the issues are not suitable for disposition under the rule. In this case, both of these considerations are applicable. The summary trial judge was, in my view, led into error by the appellant's application to interpret two sentences in the contract in isolation.
- [39] In the present case, it is my opinion that both considerations are also applicable.
- [40] My analysis of the evidence set out above makes it clear that the testimonial conflict as to the identity of Ms. Bradshaw as the responsible driver should be resolved by a trier of fact receiving the evidence viva voce. There was a material conflict in the evidence that cannot be justly resolved by affidavit evidence.
- [41] In addition, there is a valid concern that the finding by the summary trial judge on the identity issue might compromise resolution of the other issues in the case. I am unable to see how the appellant is to present his case against Bradshaw/Sawicki when he does not accept that Heather Bradshaw was the driver of the vehicle that struck his motorcycle. It seems to me that the logical way to proceed is for the appellant to present his case as involving a hit-and-run collision and leave it to ICBC to attempt to establish that the driver has been ascertained as Ms. Bradshaw.
- [42] Perhaps of greater importance is the effect the identity finding would have on the counterclaim. To establish the conspiracy it alleges, ICBC must prove that Ms. Bradshaw was the driver, that both the appellant and Mr. Sandli knew that to be so and that they conspired to defraud ICBC by alleging that the collision was a hit-and-run when it was not. There has to be a serious question as to whether Mr. Sandli would be bound on the counterclaim by the identity finding made in the action by the order under appeal. Mr. Sandli is a party only in the counterclaim. This means the potential for inconsistent findings with respect to a material fact looms large. Determination of the identity issue at a summary trial does not assist in the resolution of all issues in the proceeding.
- [43] I would allow the appeal. I would confirm the provision in the order that Bradshaw/Sawicki be added as defendants. I would set aside the provision that they be defendants in place of ICBC and I would set aside the provision that the action be dismissed as against ICBC.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Mr. Justice Harris"

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