
CANADA / JUDGMENT

Gill v. Morin

2010 BCSC 503

COURT

Supreme Court of British Columbia

DECIDED

15 April 2010

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2010 BCSC 503 Gill v. Morin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Morin,

2010 BCSC 503

Date: 20100415

Docket: M94980

Registry: New Westminster

Between:

Gurdeep Singh Gill, an infant by his Guardian Ad Litem

Piar Gill and the said Piar Gil

Plaintiff

And

Lyle James Morin

Defendant

And

Piar Gill and Gurcharan Singh Gill

Third Party

Before: The Honourable Master Keighley

Reasons for Judgment

Counsel for the Plaintiff:

No appearance

Counsel for the Defendant, Lyle Morin:

M. Hall

Counsel for the Third Party:

D. Gautam

Counsel for the Public Guardian and Trustee of British Columbia

P.A. Mazzone

Place and Date of Hearing:

New Westminster, B.C.

March 25, 2010

Place and Date of Judgment:

New Westminster, B.C.

April 15, 2010

- [1] On June 4, 2004, 11 year old Gurdeep Singh Gill ("Gurdeep") was grievously hurt when the all terrain vehicle he was then operating, of a type commonly described as a "quad", struck or was struck by a car driven by the defendant, Lyle James Morin ("Morin") on Harris Road in Abbotsford. The gravity of Gurdeep's injuries was such that he was flown from the accident scene by helicopter. He suffered numerous fractures, including a compound fracture of the femur and a skull fracture. The Statement of Claim alleges that he has been left with hearing loss, balance problems and cognitive deficits.
- [2] Gurdeep's Statement of Claim issued October 21, 2005 names his mother, Piar Gill ("Piar") as his guardian ad litem. Morin's Statement of Defence issued March 29, 2006 denies liability and alleges negligence on Gurdeep's part in the operation of the quad and on the parts of his parents for their alleged failure to adequately supervise their son.
- [3] On August 1, 2007 Morin issued a Third Party Notice against Piar and her husband, Gurcharan Singh Gill ("Gurcharan") seeking contribution and indemnity for the amount of any judgment which Gurdeep might be granted against him.

- [4] The issuance of the Third Party Notice placed Piar in a position of conflict: she could not continue to act as litigation guardian for her son while defending against Morin's third party claim. A dialog then began between her counsel, Mr. Gautam and staff at the office of the Public Guardian and Trustee ("PGT") concerning the removal of Piar as litigation guardian and a possible replacement by the PGT. The PGT was, and remains, unwilling to assume the role unless insulated from any claim for costs.
- [5] In the meantime, counsel agreed on severance of the liability and quantum components of the claim and a trial on the issue of liability only was scheduled for March 2, 2009. Due to the ongoing discussions between Mr. Gautam and the PGT that trial date was adjourned by consent and the trial relating to liability only has now been rescheduled for July 12, 2010, for five days.

The Application

- [6] On the application before me, Piar and Gurcharan apply for the following orders:
1. An order removing Piar as guardian ad litem;
 2. An order that the PGT be appointed in her place;
 3. Alternatively, an order generally adjourning the liability portion of the trial scheduled to proceed on July 12, 2010;
 4. Costs.
- [7] Counsel for the plaintiff, although not present, supports the application, including the alternative relief. The PGT opposes paragraph 2 but not paragraphs 1 and 3. Counsel for Morin opposes paragraphs 3 and 4, but not paragraphs 1 and 2.

The Role of Guardian Ad Litem

- [8] Rule 6(2) of the Rules of Court reads as follows:

A person under legal disability shall commence or defend a proceeding by his or her litigation guardian.

- [9] Thus a person under a legal disability may not sue or be sued rather than through a litigation guardian who is obliged to manage the litigation and is available to pay costs. The expression "a person under legal disability" is not specifically defined to include an infant, but from other provisions of the Rule it can be said to include infants. Rules 6(10), (10.1), and (11) read as follows:
- (10) If it is in the interest of a party who is under disability, the court may remove, appoint or substitute a litigation guardian.

(10.1) A party to a proceeding who attains the age of majority may, if the party is then under no legal disability, file an affidavit confirming the attainment of the age of majority, in Form 4.1, and deliver a copy of that affidavit to all parties of record.

(11) A party shall not take a step in default against a person under disability without leave of the court.

[10] Piar recognizes that she is unable to continue as litigation guardian and has canvassed her relatives and those of her husband in the hope of finding someone to replace her. She has not been successful.

PGT as Litigation Guardian

[11] Section 7 of the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383 [Public Guardian and Trustee Act], reads as follows:

7(1) If appointed under a court order or enactment as guardian of the estate of a young person, the Public Guardian and Trustee is a trustee of all property that comes into the control of, or is held by, the Public Guardian and Trustee on behalf of the young person.

(2) If guardian of the estate of a young person, the Public Guardian and Trustee may act as litigation guardian for the young person in making or defending claims brought for or against the young person as the Public Guardian and Trustee considers advisable and in the young person's best interests.

(3) If a litigation guardian is required for a young person under the Court Rules Act and is not otherwise provided for by the Infants Act, the Public Guardian and Trustee must act as litigation guardian for the young person if the Public Guardian and Trustee considers it is in the young person's best interests to do so.

[12] Mr. Gautam, counsel for Piar and Gurcharan, says that s. 7(3) is mandatory and relies on the decision of Joyce J. in the case of *Kea v. Blake*, 2002 BCSC 424. In that case, the real issue before the court was whether the PGT was entitled as a condition of its acting as guardian for the infant defendant to an order that its costs be paid as special costs in any event of the cause. The plaintiff was the owner of real property located in Mission, B.C. Sometime prior to August 2001 he had befriended the defendant, an infant and transferred his real property into the names of himself and the infant as joint tenants. Subsequently the plaintiff had a change of heart and asked the infant defendant to re-convey her interest in the property to him. She declined. The plaintiff then transferred his remaining half interest in the property to himself and another as tenants in common in order to sever his joint tenancy with the defendant. Some two months later he commenced this action seeking to recover his one half interest in the property from the infant defendant and brought an application before Joyce J. seeking the appointment of the PGT as litigation guardian in order that he might proceed with the litigation. Joyce J. considered the provisions of s. 7(3) of the Public Guardian and Trustee Act as well as s. 10 of the Infants Act, R.S.B.C. 1996, c. 223 [Infants Act], which provides as follows:

The court may direct that the costs of

- (a) a proceeding commenced by the Public Guardian and Trustee, or
- (b) a proceeding in which it is necessary or expedient for the Public Guardian and Trustee to attend

be taxed and paid either out of the estate of the infant or by any other person who is a party to the proceeding.

[13] As in the case at bar, there appeared to be no person qualified or willing to act as litigation guardian.

[14] Joyce J. determined that in the circumstances, the PGT should be appointed. As to the position of the PGT that it was only prepared to act if the plaintiff was willing to pay its costs, he said at paras. 19-20:

[19] In my view, the position taken on behalf of the Public Guardian and Trustee is at best premature. If the defendant is successful in the action she will remain the owner of a half interest in real property that has significant value (\$45,000 according to the transfer). In addition, the defendant will likely be entitled to costs from the plaintiff. The Public Guardian and Trustee may then seek recovery of its expenses from the defendant's estate in accordance with s.10 of the Infants Act.

[20] It is only if the defendant is unsuccessful that the Public Guardian and Trustee would not be able to seek recovery of its expenses from the defendant's estate. The Public Guardian and Trustee suggests that the plaintiff be required to assume liability for the costs of the Public Guardian and Trustee as a condition of being able to pursue his claim, even if that claim is ultimately successful. Not only would the plaintiff have to pay the costs of the unsuccessful party, he would have no control over those costs except to the extent of being able to have them taxed by the Registrar at the end of the day.

[15] Ultimately Joyce J. determined that s. 7(3) imposed a duty on the PGT to act on behalf of the infant even where the PGT might not be successful in recovering the costs of its representation.

Position of the PGT

[16] Mr. Mazzone on behalf of the PGT points out that the infant is presently 17 years of age. He will attain the age of majority on February 2, 2012. Mr. Mazzone says that there was no evidence that the infant cannot decide when he becomes an adult whether he wishes to proceed with this litigation. Neither, he says, is there any evidence that such a delay would be prejudicial to the defendant. Mr. Mazzone suggests that an appropriate disposition would be the adjournment of the trial and a stay of proceedings until the infant plaintiff attains the age of majority.

[17] There is some authority for such a disposition. In the case of *Howe v. Vancouver (City)*, (1957) 22 W.W.R. 385, 9 D.L.R. (2d) 78 (B.C.S.C.). The infant's father, as litigation guardian, wished to discontinue the action or consent to its dismissal and the defendant was willing to forego any claim for costs in the event the matter was so resolved prior to trial.

[18] The court noted that it did not have the power to compel the father to proceed against his will with the son's lawsuit. The court concluded that even if it had such power it would not be inclined to exercise it, thereby compelling the father to risk his family home and other moderate possessions or assets upon the uncertain outcome of possibly prolonged and expensive litigation. The court also suggested that it did not seem to be in the best interests of the infant plaintiff to have the infant represented by a "next friend" who was less than enthusiastic with the prospects of the lawsuit.

[19] The court determined that it was appropriate to remove the father as litigation guardian but then considered who should act for the infant plaintiff. The court stated at para. 15:

Before a new next friend could be appointed the written authority of such person expressing his willingness to act in such a capacity would require to be filed. The court certainly possesses no authority to appoint a next friend against his will.

[20] The court continued at para. 16:

I fully appreciate that the order which I have decided to make herein will not be acceptable to the defendant corporation whose officials will justifiably complain of prejudice to its defence by a long delay. I can see no other way out of my difficulty, however, than to refuse defendant's present application for dismissal of the infant plaintiff's action and also to deny the next friend's request for approval of the settlement or compromise of the infant plaintiff's claim upon the basis suggested. In the result (and subject to such directions as I sincerely hope will be made by the Court of Appeal in this matter) the action will be stayed until (a) the next friend decides to proceed, or (b) another next friend consents to act and the Court appoints him in the place and stead of the present next friend upon application made for that purpose, or (c) the infant plaintiff attains his majority and has capacity to continue the action in his own name.

[21] In the case of *Rothwell v. Scruton*, 21 February 1997, Vancouver CA020788 (B.C.C.A.), a father had commenced an action on behalf of himself and two infant children with respect to the death of his spouse by alleged medical negligence. Just prior to the commencement of the trial, plaintiff's counsel recommended dismissal of the claim with costs as a result of what he perceived as the weakness in the plaintiff's case on liability and causation. The PGT would not consent to, or approve, a settlement on that basis and the father applied under s. 32 of the *Infants Act* for approval of the proposed settlement and an order directing the PGT to proceed with the action on behalf of the infants. The trial judge accepted the submissions of the PGT and stayed the proceedings until the youngest infant reached the age of 19.

[22] On an application for leave to appeal, the British Columbia Court of Appeal referred to the decision of *Howe* and concluded that the chambers judge had made no error in principal.

[23] In the case of *Oliver v. Branch et al*, 1999 BCCA 330 the PGT appealed an order that the action be stayed for one month on the condition that in event the litigation guardian (the infant's mother) had not retained counsel to take conduct of the action by the appointed time, the PGT was to forthwith appoint counsel to act for the litigation guardian on behalf of the infant.

[24] Southin J.A., writing for the court, stated at para. 9:

I do not consider that it is appropriate for the Court to order the Public Trustee to appoint a solicitor to act for a guardian ad litem unless that is done with the consent of the guardian ad litem.

[25] She went to say at para. 10:

We are aware that if this appeal is allowed, as it is going to be, and the action is stayed, the defendants may have this litigation about their necks insofar as the Guardian ad Litem's claim is concerned until Tarryn Oliver turns 19 in the year 2001. But although it is a nuisance to the defendants, it will not do them any particular harm. We are not dealing with a situation where, for instance, the important witnesses are all at death's door or anything of that kind. There might be some different considerations if that were so.

[26] In the result, the court ordered the proceeding to be stayed until the infant obtained the age of 19.

[27] The case of *Blue v. The Corporation of the Township of Esquimalt et al.*, 2004 BCSC 1241 was a lawsuit commenced by the mother of an infant as litigation guardian for her son as a result of a significant head injury he had suffered in a fall. After commencing the litigation, the mother stopped providing instructions to the law firm she had retained and apparently resolved to move herself and her son to France.

[28] The law firm applied to court for an order that it was no longer counsel of record, and in the alternative for an order removing the litigation guardian and appointing the PGT in her place. Counsel also sought, in the alternative, that should the PGT not be appointed litigation guardian, there be a stay of the action until the infant reached the age of majority.

[29] The court noted the provisions of s. 7(3) of the Public Guardian and Trustee Act and accepted the proposition that a court had no statutory authority to appoint the PGT as litigation guardian in the circumstances. It does not appear that Key was cited to the court.

[30] Wedge J. noted that a similar but not identical statutory regime exists regarding disabled adults who require a litigation guardian. She noted that in *Marits v. Wolber*, [1997] B.C.J. No. 278 (B.C.C.A.) the court of appeal concluded that there was no authority to appoint the PGT, in the absence of its consent, as litigation guardian for an incapable adult. The court concluded that the best course of action was to enter a stay of proceedings until the infant attained the age of majority. At paras. 14-16 of the decision, Wedge J. said as follows:

14. The Court has broad powers under its inherent jurisdiction to do "all that is necessary to do justice between the parties" (*Glover v. Glover et al* (No. 7) (1980), 29 O.R. (2d) 392 (C.A.)). However, this is a common law power that must be considered in light of statutory authority. Without deciding whether the Court has the authority to appoint the PGT litigation guardian of an infant in the absence of the PGT's consent, I accept that in the circumstances of this case the PGT has exercised its discretion as contemplated by s. 7(3) of the Act in declining to consent to its appointment.
15. It is most unlikely the PGT would be able to retain counsel to act in this case. The PGT does not have funding available to finance claims for impecunious plaintiffs and, as noted earlier, must enter into contingency fee arrangements for the prosecution of meritorious personal injury claims. At this point in time, as a result of Ms. Blue's lack of cooperation, it is not possible to assess the merits of the case. The only information available is anecdotal in nature.
16. I accordingly accept that in the circumstances of this case, the course that will best serve William's interests is a stay of the action. I have been referred to a number of cases in which similar orders have been made.

The Defendant Morin's Position

- [31] Ms. Hall, on behalf of the defendant Morin, says that her client, who disputes liability for the accident, will be significantly prejudiced by the delay which would attend a stay. Evidence of witnesses will become less reliable she says, and her client will have this litigation "about his neck" for many years yet to come.
- [32] It is indeed regrettable that this defendant, who may eventually be found to be blameless with respect to this accident, may be obliged to wait several more years for the issues of liability and perhaps quantum to be resolved, but in the absence of any specific evidence, I am not prepared to find that the defendant is prejudiced by a stay of this action until the plaintiff obtains the age of majority. The limitation for this cause of action will not begin to run against the infant plaintiff until he reaches the age of majority on February 2, 2012 and it seems to be the defendant is no more prejudiced by a stay of proceedings than he would be had the plaintiff waited until then to commence this action.

Result

- [33] In the result then, Piar will be removed as litigation guardian forthwith. The third party's application to appoint the PGT as litigation guardian is dismissed. The action will be stayed until the infant plaintiff reaches the age of majority. Should counsel be unable to resolve the issue of costs, that issue may be brought back before me.

"Master Keighley"

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