
CANADA / JUDGMENT

Glover v. Leakey

2016 BCSC 1624

COURT

Supreme Court of British Columbia

DECIDED

31 August 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 1624 Glover v. Leakey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Glover v. Leakey,

2016 BCSC 1624

Date: 20160831

Docket: M51479

Registry: Vernon

Between:

Diana Glover

Plaintiff

And

Kenneth Roger Leakey

Defendant

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:

M. Yawney

R. Irving

Counsel for the Defendant:

D. Yerema

D. James (on July 8 and 28, 2016)

Place and Date of Trial and Application Hearing:

Vernon, B.C.

June 28-30,

July 4-8, 11-15, and 28, 2016

Place and Date of Judgment:

Vernon, B.C.

August 31, 2016

Introduction

- [1] This accident concerned a motor vehicle accident on January 3, 2012 where the plaintiff Diana Glover was a backseat passenger in the 1998 Subaru Legacy which she co-owned with the her husband, the defendant Kenneth Roger Leakey. Kenneth Leakey was the driver of the Subaru. The Subaru struck the back of a snowplow on Highway 97 near Bear Lake, B.C. The plaintiff suffered significant injuries in the accident.
- [2] I heard this action with a jury from June 28 to July 15, 2016. Both liability and damages were in dispute. The parties requested that I instruct the jury on both liability and damages and direct them to make a decision on both issues, whether or not they found the defendant liable for the accident.
- [3] The jury found that Mr. Leakey was not liable for the accident. They provided answers to the questions related to damages.
- [4] The defendant applied for judgment immediately after the jury's verdict. I did not enter judgment.
- [5] Three issues arise from the jury trial:
1. the plaintiff applies for a mistrial on the issue of liability;
 2. the plaintiff alleges that the defendant engaged in an abuse of process;
 3. the plaintiff seeks to set aside portions of the jury's verdict in respect of damages.
- [6] For the reasons that follow, I declare a mistrial, grant judgment to the plaintiff on the issue of liability because the defendant engaged in an abuse of process and decline to set aside portions of the jury's verdict on damages.

Mistrial

Background

- [7] As noted, Ms. Glover was a backseat passenger in the vehicle that her husband was driving on January 3, 2012. Penny Yeomans was also a passenger in the front seat of the defendant's vehicle at the time of the accident and she also suffered personal injuries. She commenced a separate action (the "Yeomans Action").
- [8] In this trial, the defendant denied liability and challenged the damages sought by Ms. Glover.
- [9] On July 4, 2016, while the jury trial was underway, the plaintiff brought an application to have the defendant's position on liability dismissed on the basis of an abuse of process. The application was brought under Rule 9-5(1)(d) of the Supreme Court Civil Rules which provides:
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (d) it is otherwise an abuse of the process of the court,
- and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
- [10] The application was based upon an inconsistent pleading filed by Mr. Leakey in the Yeomans Action and that filed by him in this action. The plaintiff also sought special costs.
- [11] The facts upon which the plaintiff relied in bringing her application were these:

The Within Action

6. On December 11, 2013, Glover filed a notice of civil claim in the within action. Glover alleged that Leakey was solely at fault for the Accident. In Part 3, paragraph 1, Glover particularized the negligence of Leakey which caused the Accident.
7. On June 26, 2014, Leakey filed a response to civil claim. Paragraph 1 of division 2 of part 1 reads as follows:

The Defendant denies the particulars of negligence as alleged in Part 3, paragraphs 1(a) to (j) of the Notice of Civil Claim.

The "Liability Denial"

8. On May 14, 2015, Leakey filed an amended response to civil claim. The Liability Denial was not amended. Additional facts were added raising the defence of no negligence, inevitable accident, the "agony of the moment" and the "agony of the collision".
9. At no time has Leakey claimed that any other party may be responsible for the Accident.

10. A jury trial began on June 27, 2016 and is scheduled to conclude on July 15, 2016. To date, Leakey has maintained a denial of liability.

The Yeomans Action

11. On June 29, 2012, Yeomans filed a notice of civil claim commencing Action no. 947417 in the Supreme Court of British Columbia (Kamloops Registry) (the "Yeomans Action"). Yeomans named Glover, Leakey, Yellowhead Road & Bridge (Fort George) Ltd. and Raymond Warren as defendants. Paragraph 10 of the notice of civil claim reads as follows:

The plaintiff was injured in a motor vehicle accident that occurred on or about January 3, 2012 on Highway 87 near Bear Lake, British Columbia and at that time, the plaintiff was a seat belted passenger in the Subaru when it rear ended the Western Star that was stopped on the highway.

12. On September 5, 2012, a response to civil claim was filed on behalf of Glover and Leakey. Paragraph 1 of division 2 of part 1 reads as follows:

The accident particularized in paragraph 10 of the Notice of Civil Claim occurred as a result of the negligence of the Defendant, Kenneth Roger Leakey, while driving a motor vehicle owned by the Defendants, Glover and Leakey.

[Underlining added by counsel for the plaintiff]

13. It is believed that the Yeomans Action has now been settled.

Discovery of the Inconsistent Pleadings

14. On June 28, 2016, counsel for the plaintiff discovered the admission of liability in the Yeomans Action. Counsel for the plaintiff contacted counsel for Leakey and requested that liability be admitted. To date, Leakey has maintained the denial of liability.
- [12] The defendant opposed the plaintiff's application on various bases including that the application was brought too late; the plaintiff had not met the heavy onus on her to prove that there were inconsistent pleadings; that any alleged inconsistent pleadings did not lead to a finding of abuse of process; and, for reasons of public policy each claim by a plaintiff needs to be handled individually.

Hearing of July 8, 2016

- [13] The application was heard on July 8, 2016. The defendant was represented by J. Derek James, rather than trial counsel, David Yerema.
- [14] At the hearing, Michael Yawney, counsel for the plaintiff, suggested that because the jury trial was underway, the timing of the application was problematic. Mr. Yawney suggested that the decision on the abuse of process application wait until the jury had reached a verdict on liability, reasoning that if the Court found that there was an abuse of process the jury may perceive, having sat on the case for two weeks of evidence, declaring the defence of liability to be an abuse of process might harm their view of the integrity of the

administration of justice. Mr. Yawney suggested that in the circumstances, I should defer judgment on the issue until the conclusion of the jury trial but before the final order for judgment is entered. Mr. Yawney acknowledged that that gave the Court time to consider the matter thoughtfully and let the jury finish their work. In that regard, Mr. Yawney said the jury did not have to see how the system had failed in some respects, and there would be no urgency in terms of the timeline for a decision.

[15] Mr. Yawney submitted that it was within the Court's discretion to fashion a remedy in the circumstances because it involved the integrity of the administration of justice. He referred to his suggestion to delay the decision on the application as a concession on the part of the plaintiff "recognizing the bigger picture".

[16] At the end of the hearing I had a discussion with counsel about delaying the judgment and whether or not it may become moot if the jury decided that Mr. Leahey was liable. I asked Mr. James if he had anything that he wished to say, to which he responded:

Well, there was one item, but I'm not sure that it's . . .

Actually there's nothing. It just occurred to me though that the -- the issue of what to -- what is to be done if the remedy is to wait until the jury decides, and I must admit I'm not entirely clear what my friend is proposing in that regard, so the jury would give its verdict, of course a verdict is not an order of the court, at that time defence counsel, who will be Mr. Yerema, will move the court for -- for an order for judgment on the jury's verdict, and I suppose, is it that stage that there would be a further consideration of this issue?

[17] I then stated: "Yes, the jury -- the judgment wouldn't be entered", to which Mr. James responded "Okay".

[18] Mr. James continued:

And having heard my friend's further submissions, I see the merit in his argument to let the jury do its job, let the jury reach its verdict, and then deal -- deal with the issue as far as the remedy is concerned. I see what he's saying.

[19] It was my understanding that Mr. James agreed to the process that Mr. Yawney suggested: proceed with the jury trial and await their verdict. The judgment would not be entered pending my decision on the abuse of process application.

[20] When the hearing concluded on July 8, I had the option of delivering a decision the following Monday, July 11 or accepting Mr. Yawney's proposal to postpone the decision on the abuse of process matter until after the jury had heard the evidence and reached its verdict on both liability and damages.

Continuation of Trial on July 11, 2016

[21] I chose the latter course, and on July 11, 2016 made the following statement to Mr. Irving, who was Mr. Yawney's co-counsel, and to Mr. Yerema who acted for the defendant in the jury trial but not in respect of the abuse of process matter. Mr. Yerema asked about the ruling of the court on the application, to which I responded:

THE COURT: Yes, the application --

MR. YEREMA: On the application.

THE COURT: -- to find -- the application to find ICBC in having abuse of process. And I have -- have a seat, thank you. I've considered the -- the matter and I agree with both counsel, that it -- a more -- the most practical course is to proceed and in the event that the jury -- well, when the jury comes in, if they make a finding of -- if there is no liability, that I postpone entering judgment until I make a decision. If they find that the defendant is liable, then we'll address it then and -- as it was suggested by counsel for the plaintiff and counsel for the defendant agreed to it. So I think that's the most practical course.

[22] Mr. Yerema did not object to the course that I proposed. The trial proceeded.

[23] The parties agreed that I would charge the jury on both liability and damages which I did on July 14, 2015.

Proceedings on July 15, 2016

[24] While the jury was deliberating, Mr. Yerema raised a concern about my postponing my judgment on the abuse of process application until after the verdict was rendered. He advised that Mr. James, counsel on the application, did not agree that judgment would not be entered on the jury's verdict until I ruled on the abuse of process application. Mr. James was not in the courtroom at that time. I explained my understanding to Mr. Yerema, that is, that if the jury found no liability that the judgment would not be entered pending my decision on abuse of process. I did not know what Mr. James' understanding was.

[25] On July 15, 2016, the jury reached its verdict after deliberating for approximately 9 1/2 hours.

[26] In respect of their verdict, the jury advised they were unanimous. In response to Question 1: "Was there any negligence on the part of the defendant that caused or contributed to the harm or damage suffered by the plaintiff?", the jury answered "No".

[27] The jury was asked to consider the remaining questions concerning the quantum of damages and did so.

- [28] A signed copy of the jury foreperson's verdict sheet was entered as an exhibit. Mr. Yerema on behalf of the defendant asked to have the verdict entered as an order of the Court. I declined to make that order at the time because of my understanding of how the abuse of process application would be addressed. The plaintiff also asserted that there was no reasonable evidence to support the jury's verdict on liability and past wage loss.

Hearing of July 28, 2016

- [29] On July 28, 2016, I heard Mr. Yawney and Mr. James on the procedure to be adopted in respect of reasons on the abuse of process application. Mr. James advised that he did not agree to postpone the delivery of reasons on the application on the condition that the jury verdict not be entered. Instead, he asserted that the plaintiff waived her claim for the relief involving striking of the paragraphs of the pleadings denying liability and was content to pursue her claim for relief in costs.
- [30] Mr. James referred to various excerpts from the transcript of the proceedings of July 8, 2016 where he says that Mr. Yawney, on behalf of the plaintiff, referred to the plaintiff conceding to have the jury proceed to address liability and thus waived her remedy of striking the pleadings.
- [31] Mr. James took the position that judgment ought to be entered as that was the agreement that was made by the parties.
- [32] Mr. James says that Mr. Yerema did not agree to the approach that I outlined on July 11, 2016. Mr. Yerema did not argue the abuse of process issue and was not present during the hearing.

Decision

- [33] At the conclusion of the July 28, 2016 hearing, it was clear to all that there had been a misunderstanding between counsel in respect of how the matter would proceed before the jury and whether the jury's verdict would be entered as a judgment of this court. I was clearly of the view that Mr. Yawney was not conceding the liability issue, but suggesting that the decision on abuse of process be postponed pending the jury's verdict. I also understood that if the jury found that there was no liability, judgment would not be entered pending my decision on abuse of process.
- [34] Mr. James says he made no such agreement. His understanding of the agreement is not reflected in the transcripts of the proceedings, nor is it likely that it was what Mr. Yawney proposed. Would plaintiff's counsel bring the application and then abandon the relief of having the defendant's position on liability dismissed on the basis of an abuse of process and only proceed with costs? I think not.

- [35] The matter proceeded as it did based on a misunderstanding. The plaintiff proceeded, I find, to her detriment, because of her reliance on an agreement between counsel, where none existed.
- [36] The plaintiff proceeded with her case before the jury; she chose not to cross-examine Mr. Leakey about his inconsistent pleadings; she left the matter of liability with the jury. In all, I find that the misunderstanding between counsel caused both parties to proceed on a basis that was not clearly understood. Further, had I understood that Mr. James did not agree to Mr. Yawney's proposal to reserve the decision on the abuse of process matter, I would have provided a decision before the jury proceeded on July 11, 2016. It is regrettable that Mr. James did not express his position to the Court about the agreement between counsel before the trial concluded and the jury verdict was announced.
- [37] A trial judge does not have jurisdiction and is functus officio to hear an application after a jury has rendered its verdict, except an application that goes to an issue of trial fairness.
- [38] This was confirmed by the Court in *Leslie v. Parmar*, 2006 BCCA 256, where the appellant, the defendant in the personal injury action, sought a mistrial three months after the jury's verdict was rendered to set aside a jury verdict based on a witness who gave evidence and later advised counsel for the plaintiff that her evidence may not have been accurate. The witness was not recalled. The trial judge dealt with the matter in her charge to the jury. The verdict was not entered as a court order.
- [39] On the application the trial judge concluded that the jury must have acted on evidence that was false and misleading, although she did not identify any such evidence. She determined the trial should continue without a jury for the assessment of damages.
- [40] The Court of Appeal found that the trial judge had no jurisdiction to consider the plaintiff's application and ought to have dismissed it as unfounded in law. The Court considered that the judgment should have been entered pursuant to the jury's verdict and counsel could then consider whether they ought to appeal (at paras. 23 and 25).
- [41] *Leslie* was considered in *Oberreiter v. Akmal*, 2009 BCCA 557, where the defendants sought to appeal a decision of the trial judge declaring a mistrial after the delivery of the verdict by a civil jury before the judgment in the action was entered.
- [42] In that case, counsel for the plaintiff learned after the jury's verdict that an exhibit, a DVD compilation of surveillance evidence on the plaintiff, contained 10 additional minutes of footage that had not been shown to the jury during the trial but was with the jury during its deliberations.

- [43] The trial judge did not enter the judgment and approximately one month later heard the plaintiff's application for a mistrial. He declared a mistrial, relying on *de Araujo v. Read*, 2004 BCCA 267, where Mr. Justice Thackray observed at para. 68: "a new trial may be ordered where the trial irregularities may have influenced the verdict or award of the jury " (at para 13).
- [44] The Court of Appeal reviewed the jurisprudence relating to whether the trial judge had jurisdiction to rectify an irregularity in a jury trial before judgment was entered.
- [45] At para. 10 of the decision the Court referred to the decision of *R v. Burke*, 2002 SCC 55, where the Court confirmed that the court maintains jurisdiction to declare a mistrial after the jury was discharged as part of its remedial jurisdiction, and delineated circumstances where that might occur including, a reasonable apprehension of bias: at paras. 70 to 74.
- [46] After citing the authorities that confirmed that a trial judge has no jurisdiction to hear an application after the jury has rendered its verdict, including *Leslie v. Parmar*, the Court stated at paras. 23 and 24:
- [23] In this case, the respondent's application for a mistrial was not based on an improper verdict but was made pursuant to the court's inherent jurisdiction to rectify an irregularity that went to the issue of trial fairness. This is an issue of law that is addressed pursuant to the court's remedial jurisdiction.
- [24] It is settled law that until a judgment or order has been entered, a trial judge continues to be seized of the matter before him or her. In *Clayton v. British American Securities*, [1935] 1 D.L.R. 432 at para. 83, [1934] 3 W.W.R. 257 (B.C.C.A.), the court noted that this was recognized as an "unquestioned practice" and "one of very long standing". Similarly in *Burke*, the court concluded that, as a principle of law, a trial judge retains the remedial jurisdiction to declare a mistrial on an issue that goes to trial fairness (in that case it was whether there existed a reasonable apprehension of bias) after a jury verdict has been rendered and the jury discharged.
- [Underlining added.]
- [47] I have already determined that due to the misunderstanding between counsel and the court the plaintiff proceeded with the trial and, in so doing, compromised her position. In other words, she did not have a fair trial.
- [48] It is obvious (based upon my decision on the abuse of process matter, below) that had I rendered a decision on the abuse of process before the trial proceeded and before the jury reached a verdict, the result in this case would have been different.
- [49] The plaintiff asserts that I ought to declare a mistrial in respect of the liability portion of the verdict only. No authority was provided and I have not found any authority where a mistrial can be declared for only a portion of the jury's verdict.

- [50] While the argument has a certain attraction because of the obvious judicial efficiency, I find it would be unfair and contrary to the principle in *Oberreiter*. If a mistrial is granted to remedy an issue of trial fairness that may have impacted the verdict, it is likely that the apparent unfairness tainted the entire proceeding. If not, it would be very challenging to sever a part that was not impacted by the irregularity. It is difficult to know to what extent the plaintiff's compromise impacted the entirety of the trial. While not directly the subject of the mistrial application, the defendant's position on liability and comments made to the jury minimizing the accident likely impacted the assessment of damages. There could also be a concern about litigating in slices. It would be an effective severing of issues in the trial that has already been conducted.
- [51] A mistrial is appropriate where necessary to ensure that justice is done between the parties: see *de Araujo v. Read*. The plaintiff's application for a mistrial is allowed.

Abuse of Process

- [52] I have already referred to the facts upon which the plaintiff asserts an abuse of process by the defendant. It is based on the inconsistent pleadings by the same defendant, Mr. Leakey in this action and the *Yeomans Action*. Ms. Glover and Ms. Yeomans were both passengers in the defendant's vehicle. Neither of them was contributorily negligent. They were in the exact same situation in relation to whether the defendant was negligent.

Legal Framework

- [53] The court has inherent power to prevent its procedure from being used in a manner that brings the administration of justice into disrepute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37. The doctrine of abuse of process is a broad and flexible mechanism; its purpose is to enable the court to prevent misuse of its own process: *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 22.
- [54] In *Jensen v. Ross*, 2014 BCCA 173, Mr. Justice Goepel referred to the following passage from *Babavic v. Babowech* (1993), 42 A.C.W.S. (3d) 447 (S.C.):
- [17] ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose.
- [18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. ...

- [55] Canadian courts have invoked the doctrine of abuse of process in circumstances where, while issue estoppel may not be made out, permitting the litigation to proceed would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City)* at para. 37.
- [56] In *First Majestic*, Mr. Justice Tysoe considered whether the concept of abuse of process could extend to inconsistent factual positions rather than just an inconsistent election of rights. Tysoe J.A. concluded that the plaintiffs had not made inconsistent allegations in a previous action as the defendants argued. His reasons make reference to a number of cases supporting the proposition that inconsistent positions in prior proceedings can constitute an abuse of process. *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480 was cited with approval.
- [57] In *Mystar*, the applicants argued that the respondent had made an inconsistent claim and that their action should be dismissed as abuse of process. The relevant Alberta rule is nearly identical to the B.C. rule:

129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that ... (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly.

- [58] The alleged inconsistent claim in *Mystar* was that in a previous action against a different defendant, the respondent claimed they lost half interest in a particular property. Then in a later action the respondent claimed to have lost 100% interest in the same property. While considering the applicable principles, Mr. Justice Brooker held at para. 49:

In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.

[Emphasis in original.]

- [59] In the result, Brooker J. found that it was not plain and obvious that the action in that case was an abuse of process as he "[did] not read the current Amended Statement of Claim as asserting that [the respondent] never lost a 50% interest in the property" (at para. 71). The case is instructive as it recognizes that advancing irreconcilable positions in various actions is impermissible. This is adopted in *First Majestic*.
- [60] The decision of *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247 is also informative. In that case the appellant, Pepper's Produce entered into a contract to buy a business that failed to complete. Two parties filed a small claims action against Pepper's Produce. The president of Pepper's Produce deposed that these individuals were not parties to a contract and they had never met. Pepper later brought its own action, stemming from the same transaction after the small claims action was dismissed and sought to add the individuals that they had denied knowing as parties to the new action.

- [61] Madam Justice Levine upheld the decision of the chambers judge refusing to add those defendants. She held, in part relying on *First Majestic*:
- [28] These positions are diametrically inconsistent within the same action, and the claims against Gao and Tan are diametrically inconsistent with the appellant's response to the Small Claims action. These proceedings cannot, as a matter of protecting the integrity of the court's process, stand together.
- [62] Whether taking contrary positions on the same issues in separate proceedings, i.e. inconsistent pleadings, constitutes an abuse of process depends on the context and circumstances of each case: *Mystar* at para. 53; *Stewart v. Clark*, 2013 BCCA 359 at para. 51.
- [63] In *Halagan v. Reifel*, 1997 CarswellBC 4040, Madam Justice Satanove considered an application to amend pleadings. She refused to do so and dismissed the application because the proposed amendments were inconsistent. She found they constituted approbation and reprobation. At para. 8 she stated:
- [N]either pleadings nor any other of the court processes are a game to be played according to what appears to be a strategic advantage of the time. The court expects a party to take a position which is consistent with its evidence and to maintain that position in its dealings with the court. In other words, saying something to one judge and saying the opposite to another will not be countenanced.
- [64] The test in the context of Rule 9-5(1)(d) is a high one: it must be plain and obvious that a pleading is an abuse of process.

Position of the Parties

Plaintiff

- [65] The plaintiff submits that Mr. Leakey's position in the Glover and Yeomans actions are diametrically opposed. Liability was not pleaded in the alternative in either action. The defendant was aware of his role in the accident from the outset and cannot claim that his knowledge of the accident was somehow incomplete or imperfect. The plaintiff says that in allowing Mr. Leakey to maintain a denial of liability in the Glover action is an affront to the court's process and brings the administration of justice into disrepute; it is a clear abuse of process and ought to be struck, and seeks judgment in favour of the plaintiff on the issue of liability.

Defendant

- [66] The defendant's position is that his differing positions on liability for the accident are not inconsistent pleadings, irreconcilable positions or an abuse of process. He claims it is permissible to have inconsistent defences to an action. Further, if inconsistent pleadings are found, the defendant argues that it is not an improper use of the court's process; the court must consider the context and circumstances of each case and the two actions must be

treated individually. He says that it has been recognized that inconsistent pleadings are permissible in the context of an insurer-insuree relationship. The defendant submits that he did not knowingly advance irreconcilable positions which he submits is an essential element of an abuse of process. Prior admissions of liability should be dealt with as an admissibility issue. Finally, the defendant's position is that to find Mr. Leakey's denial of liability as an abuse of process would have an effect of discouraging admissions.

Decision

[67] In considering my analysis of this application, I must note that the Insurance Corporation of British Columbia (ICBC), the Province's public mandatory motor vehicle insurer had conduct of both the Glover and the Yeomans actions. The evidence provided is sparse, but it is clear that the adjuster in the Yeomans Action determined that liability would be admitted on behalf of Mr. Leakey whereas the adjuster in the Glover action determined that liability would be denied. I expressly find that ICBC knew of the inconsistent pleadings and that the insured, Kenneth Leakey knew or ought to have known of the inconsistent positions.

Whether the inconsistent positions are an abuse of process

[68] Courts retain jurisdiction to dismiss actions that are an abuse of process where the principles such as judicial economy, consistency, finality and the integrity of the administration of justice will be violated. This doctrine is flexible and the categories of abuse of process are open. In my view, the defendant's inconsistent positions on liability offend all these principles which are fundamental to our system of law.

[69] Before this action was filed the defendant admitted liability for the subject accident in the Yeomans Action. He obtained the benefit of settlement with that defendant. It cannot be open to him to re-litigate something that he already conceded in the Yeomans Action. That offends the principle of judicial economy, unnecessarily expending the resources of the justice system and in this particular instance it is more egregious as the case called upon the wisdom of the community in the form of jurors. It is also contrary to the principle of finality to permit something that has been admitted to be re-litigated.

[70] Consistency is also compromised. A position that Mr. Leakey is on one hand negligent but on the other not negligent cannot be anything but irreconcilable and inconsistent. The only distinction in the pleadings is that in the Yeomans Action the defendant asserted that Ms. Yeomans failed to properly adjust and securely fasten her seatbelt. That does not alter the bare fact of the defendant's negligence.

[71] It is not relevant that Ms. Glover was a co-owner of the vehicle. The defendant has not explained how that distinction makes a difference. The same conduct of the defendant was involved in both the Yeomans and the Glover actions. To take different positions is inconsistent and provides unpredictability in the law.

- [72] I am also of the view that the administration of justice is compromised by the defendant's conflicting positions that it was his fault and then it was not his fault. Neither position was advanced in the alternative. As Levine J.A. stated in *Pepper's Produce*: "these proceedings cannot, as a matter of protecting the integrity of the court's process, stand together."

Whether the claim was brought too late

- [73] The defendant claims that bringing this application in the middle of the trial of an action is too late. This is also a surprising position for the defendant to take. Clearly the defendant and his insurer were aware of the inconsistent pleadings; but that was not shared with the plaintiff or her counsel. Counsel for the plaintiff says that he discovered the pleading in the *Yeomans Action* after this jury trial was underway.
- [74] Further, the defendant has not referred to any authorities to support its submission in this regard. I find the language in Rule 9-5 as a full answer to this point as it permits an application to be brought "at any stage of the proceeding."

Whether inconsistent defences are permissible

- [75] The defendant also submits that the denial/acceptance of liability in the two actions should be characterized as inconsistent defences rather than inconsistent "positive averments". The defence argues that it is permissible to have inconsistent defences and they should be treated differently. In that regard the defendant relies on *National Bank Financial Ltd. v. Potter*, 2005 NSCA 139. In that case the appellant, Mahoney, appealed from an order of the Nova Scotia Supreme Court dismissing the application to strike portions of the defence of the respondent National Bank as inconsistent between the actions. National Bank had pleaded in one action that there was no stock manipulation scheme and in the other that there was a stock manipulation scheme. The Nova Scotia Court of Appeal upheld the dismissal and held that the relevant Rules of Court in Nova Scotia (excerpted below) applied because the pleadings were in separate actions. The rule relied on was Rule 14.11 which provides:

Unless a party amends his pleading, he shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading of his.

- [76] The Court of Appeal held that the pleadings were not inconsistent but rather alternative pleadings. It also considered that the reasoning of the chambers judge that whether or not there was a stock manipulation was not yet fully within the knowledge of the parties; it was a complex trial where that very issue remained to be determined. At that point in the proceedings, the Court found it would be unfair make a party choose between two sets of alleged circumstances that they did not yet have full knowledge of.

- [77] I do not find the National Bank case to stand for the proposition that defences in various actions stemming from the same facts may be inconsistent and should be treated differently from positive averments. The Nova Scotia decision applies when there is an application to "strike portions of the defence".
- [78] In any event, the primary holding of National Bank was that Rule 14.11 had no application where the alleged inconsistent pleadings were in separate actions. The Court went on to hold that the pleading could not be said to be inconsistent but rather alternative pleading because the party did not yet have full knowledge of the facts. In British Columbia, the courts have clearly recognized that inconsistent pleadings in different actions can be an abuse of process (First Majestic). The court's interpretation of the Nova Scotia rule is unhelpful.

Whether the pleadings may be inconsistent where ICBC involved.

- [79] The defendant claims that under the ICBC insurance scheme, courts have recognized that there will be inconsistent pleadings referring to the decision of Mara v. Blake (1996), 23 B.C.L.R. (3d) 225 (C.A.). In that case, there were four separate motor vehicle accidents involving the same plaintiff and four separate defendants. All four defendants were insured by ICBC and represented by the same counsel. Three of the defendants admitted liability but pleaded contributory negligence. The fourth defendant denied liability. The Court was asked to consider whether it was a conflict of interest for ICBC to have one counsel acting for all four defendants.
- [80] I find this case to be distinguishable. In Mara there were multiple accidents with different facts in each. In this case, there is one vehicle and one accident. It would have been open to the different defendants in Mara to have divergent positions as they were based on different accidents. It is not analogous to this case where the defendant has taken two divergent positions on liability arising from the same accident. The Court of Appeal was not considering the issue of inconsistent pleadings but rather whether it was a conflict of interest for ICBC to have one counsel acting for all defendants.

Whether knowingly advancing an inconsistent position

- [81] I have already noted, I find that ICBC knowingly advanced an inconsistent position and I accept that as the defendant's representative the diametrically opposed pleadings were knowingly advanced. They were not articulated as alternate claims.
- [82] A pleading that is an abuse of process is not the same as the tort of abuse of process which requires "a wilful misuse or perversion of the court's process for extraneous or ulterior purpose": Border Enterprises Ltd. v. Beazer East Inc., 2002 BCCA 449 at para. 51. A pleading is distinct from an intentional tort.

Whether issue should be determined on the basis of admissibility

[83] The defendant claims that the courts in British Columbia have determined that situations such as the present must be addressed on the basis of whether the pleading is admissible in the subsequent action. While prior proceedings can be admissible in subsequent actions and there is a body of case law addressing that point, I find that the defendant has overlooked the point that the matter before me is not admissibility but rather whether inconsistent pleadings are an abuse of process.

[84] In this regard, the defendant refers to the decisions of *Caviglia v. Tenorio* (1992), 71 B.C.L.R. (2d) 255 (S.C.) and *Theriault v. Patrick* (1995), 54 A.C.W.S. (3d) 39 (S.C.).

[85] Neither of these decisions address abuse of process.

[86] In *Caviglia* the plaintiff's car slid and stalled with its fender extending into traffic. The defendant's vehicle struck the rear end of the plaintiff's vehicle as she attempted to drive around it but hit a patch of ice. A third party hit the two vehicles after the plaintiff, the defendant and the defendant's passenger had left the vehicle. The ensuing circumstances were described by Madam Justice Allan at para. 10:

An unusual issue arises in this case. The writ was issued on July 18, 1989 and the statement of defence, in which Ceoalia Tenorio denied liability, was filed on December 19, 1989. In a separate action, commenced in the New Westminster Registry on September 21, 1990 [the Second Action], Marlene Tenorio, who was a passenger in Ceoalia Tenorio's vehicle, sued her sister Ceoalia for damages suffered as a result of this accident. Marlene Tenorio also sued Mr. Caviglia in the Second Action but discontinued her claims against him in February 1991.

[87] The relevant issue in that case was whether the admission of liability made in one action was admissible and, if so, whether it is conclusive of liability or evidence to be given weight in the circumstances. The Court concluded that the prior admission was not conclusive and should go to weight at para. 26:

The plaintiff submits that Ms. Tenorio's admission of liability in the Second Action should be admitted as conclusive evidence of her liability in this case for the following reasons: the factual foundation, i.e., the circumstances of the accident are the same; the legal issue, i.e., the liability for the collision between the Tenorio and Caviglia vehicles, is the same; the defences in both action are conducted by a common insurer.

[88] Caviglia possesses some factual similarities to the present case: the defendant admitted she was liable to her passenger but denied she was liable to the car she struck. Clearly, the passenger in the defendant's vehicle was not negligent and the actions of the defendant did not affect the passenger's right to claim fully for her injuries. Those circumstances are not the circumstances here. Similar circumstances would be if the defendant has had two passengers and admitted liability in respect of one passenger but not the other.

- [89] Madam Justice Allan declined to view the admission is conclusive of liability and held that it goes to weight that should be determined in the particular circumstances of each case.
- [90] That is the same analysis that I must undertake in these circumstances. Recalling the holding in *Mystar and Stewart* that whether inconsistent pleadings constitute an abuse of process depends on the context and circumstances of this case. That is to say an abuse of process will not always be made out when litigation positions are inconsistent.
- [91] I do not find Theriault informative as it is an application to withdraw an admission of liability in a circumstance where new information came to light regarding liability.
- [92] I note that the defendant says that if the pleadings are inconsistent, the defence asks for the admission in the *Yeomans Action* to be withdrawn and undertakes to do so. This is an empty suggestion. The *Yeomans Action* has been settled and no longer exists. Withdrawal of the admission in *Yeomans Action* has absolutely no practical effect and nor is it an answer to the allegation of abuse of process.

Whether contrary to public policy

- [93] The defendant claims that to find these pleadings as inconsistent and an abuse of process will discourage admissions, contrary to public policy. I find that there is much larger public policy at stake. It is an abuse of process to allow a defendant to admit liability in respect of one passenger and deny liability in respect of the other where there are no facts to distinguish the two. Requiring a party, even ICBC, to file consistent pleadings is not onerous and, with respect, is a principled way to proceed. The pleading of inconsistent positions in this case cannot be condoned.
- [94] I have declared a mistrial in this case. It may appear that my decision on the abuse of process application is moot. It is not for three reasons:
1. A declaration of mistrial means that the matter will proceed to a new trial.
 2. I grant judgment on the liability issue in favour of the plaintiff.
 3. The plaintiff seeks special costs related to the abuse of process and has asked for leave to provide further submissions in that regard.
- [95] Both parties may seek to appear to address the issue of special costs based on my finding of an abuse of process.

Set aside the Jury Verdict

- [96] Having declared a mistrial, I find that that the plaintiff's application to set aside the jury verdict on any basis is truly moot. I decline to rule on the plaintiff's application to set aside portions of the jury verdict.

Costs

[97] The parties have leave to address costs.

"Gropper J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/16/2016BCSC1624.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/glover-v-leakey-2016>

Prepared on 27 October 2026 · Esheria