

CANADA / JUDGMENT

Hartling v. Pitman

2022 BCSC 1894

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Supreme Court of British Columbia

DECIDED

29 September 2022

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2022 BCSC 1894 Hartling v. Pitman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hartling v. Pitman,

2022 BCSC 1894

Date: 20220929

Docket: S130810

Registry: Kelowna

Between:

Richard Alan Hartling

Plaintiff

And

David Allan Pitman and Renee Marie Riopelle

Defendants

And

Vickey Hartling

Third Party

Before: The Honourable Madam Justice Hardwick

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D.P. Yerema

Counsel for the Defendants appearing by videoconference:

M. Hufton

For the Third Party:

No appearance

Place and Date of Trial/Hearing:

Kelowna, B.C.

September 8, 2022

Place and Date of Judgment:

Kelowna, B.C.

September 29, 2022

- [1] THE COURT: These are my oral reasons for judgment in respect of the notice of application filed by the plaintiff in this civil action on May 18, 2022. The application was ultimately heard before me on September 8, 2022, and I reserved to consider the issues arising from the application. As these are oral reasons for judgment, if a transcript is ordered I reserve my right to include full citation as to any case law, statute, rules, or other material cited, but the substance of my decision will not change.

Overview of the Relief Sought

- [2] The notice of application seeks leave to file an amended notice of civil claim in the form appended to the notice of application. The nature of the amendments is, in general terms, to include claims for punitive and aggravated damages.
- [3] The original notice of civil claim was filed on November 17, 2019. Following the filing of the notice of civil claim, a third party notice was filed on April 22, 2020. Again in general terms, the third party notice sought relief that most notably sought contribution and/or indemnity against the plaintiff's spouse.
- [4] Following receipt of the third party notice, the plaintiff filed an amended notice of civil claim on August 18, 2020. The effect of this amended notice of civil claim was to effectively waive any right to recover any loss that a court might attribute to the third party.
- [5] Following the amendment, the plaintiff retained new counsel. That counsel conducted the examinations for discovery which have occurred to date, and is counsel for the purposes of this application.

- [6] The matter has not yet formally been set for trial. Counsel have agreed as between themselves and confirmed in a case planning order to reserve a trial date in July of 2025. However, by virtue of the scheduling protocols in place, no notice of trial can be formally filed until one year prior to that date.
- [7] The result of the foregoing is that this application represents a somewhat unusual application to amend the pleading in the sense that the relief sought could have been included in the original notice of civil claim. It also could have been included in the amended notice of civil claim pursuant to what I would colloquially describe as the plaintiff's right of a "free amendment", given that no notice of trial has been filed.
- [8] If either of those had occurred, the pleadings would have remained as proposed by the plaintiff subject to a possible application to strike the pleadings pursuant to R. 9-5 of the Supreme Court Civil Rules. However, as the pleadings are formally closed, a court order is required to amend the pleadings and that amendment is, as I will address further below, very strenuously opposed by counsel for the defendants.

Factual Background

- [9] I will preface my review of the facts of this case on the basis that it is recognized that there are live credibility issues as between the parties on certain issues. However, particularly given that examinations for discovery have been conducted and portions of the transcript are included in the application record, the general factual matrix is clear. In reciting that factual matrix for the purposes of this interlocutory application, I am not making findings of fact which would in any way bind the eventual trial judge.
- [10] The plaintiff and the third party are spouses. The defendants are also spouses. All parties resided, at the material time, in Lake Country, British Columbia.
- [11] As of June 22, 2019, the parties could generally be described as friends, or at minimum close acquaintances. As part of that friendship, the parties socialized together from time to time. The plaintiff is a tall male person, being some six-foot-three and weighing approximately 240 pounds at the material time.
- [12] On June 22, 2019, the defendants invited the plaintiff and the third party to their residence in Lake Country to socialize and have dinner. The defendants' residence apparently has three staircases, two external and one internal.
- [13] The examination for discovery evidence of the defendant, Renee Marie Riopelle, described the circumstances succinctly:

I was working that day. We had invited the Hartlings [the plaintiff and third party] over for an early dinner. I left my job, which is a seven-minute walk from my home on Camp Road, walked home, and the Hartlings came over right after that. They met me while I was still walking down the hill back to my house, and they came in and joined us for dinner.

- [14] When the plaintiff and the third party entered the defendants' residence on June 22, 2019, they entered from an exterior staircase on the north side and generally gathered on what I will describe as the balcony. The parties moved inside temporarily but generally appeared to have remained on the deck/balcony area of the defendants' home to socialize. There were no other guests present.
- [15] The parties, as noted, were friends or at minimum close acquaintances. They have no commercial relationship such as, for example, being employee/employer. The defendants' home was not a commercial establishment. There was no paternalistic relationship between them.
- [16] Ultimately all of the parties consumed alcohol on the night in issue, namely June 22, 2019. I note that it is uncontroverted that the plaintiff and the third party brought alcohol with them to the defendants' residence. Some of that alcohol was brought for the personal consumption of the defendant, Ms. Riopelle. Generally it appears, however, that the alcohol brought by the plaintiff and the third party was primarily for their own personal consumption. Further, although Ms. Riopelle consumed that alcohol brought for her from the third party, the evidence appears consistent that she was the least intoxicated of all of the four parties participating in the social gathering. The evidence is also consistent that the plaintiff consumed some or all of the alcohol that he brought with him. It also appears uncontroverted that the defendant, Mr. Pitman, prepared at least one alcoholic drink for the plaintiff from alcohol belonging to the defendants, which neither the plaintiff or the third party brought to the defendants' residence on that evening.
- [17] As this is a clear issue for trial where the trial judge will benefit from having viva voce evidence and cross-examination, I consider it unnecessary for the purposes of this application to delve further into the evidence on this point as to whether it was more than one drink, how much alcohol was contained in that drink, or when specifically in the course of that evening it was poured and provided to the plaintiff.
- [18] The plaintiff, the third party, and the defendant Mr. Pitman, each consumed marihuana edibles. The evidence of the defendant, Mr. Pitman, is that they did so on two occasions. The defendant, Ms. Riopelle, did not consume marihuana edibles.
- [19] The dinner and related socializing apparently lasted for approximately three or at most three-and-a-half hours. At the conclusion of the evening, the evidence of the defendant, Ms. Riopelle, from her examination for discovery was that the plaintiff, "Rick", was "no longer coherent", was "slurring his words" and "making no sense at all". When asked in her discovery if he was "walking okay" her answer was "no".
- [20] At 9:00 p.m., or just before 9:00 p.m., Ms. Riopelle's evidence is that she said it was "time for you guys to leave". She did not have a specific conversation with the defendant, Mr. Pitman. Rather her discovery evidence was, "We have very good signals to each other when it's time to wrap up." Ms. Riopelle further stated as follows in her examination for discovery:

Q Okay. And you were concerned because my client was slurring his words?

A And barely able to make a conversation.

Q And did your husband agree with you? Did he say anything different? Did he say, "Rick's fine"?

A No, [he] agreed.

Q So you both agreed that he was inebriated to the point of being incoherent and slurring his words?

A Correct.

[21] The evidence of the defendant, Mr. Pitman, is generally consistent with the foregoing. For example, at his examination for discovery, the defendant, Mr. Pitman, answered as follows:

Q Now, did you agree with your wife that Rick was in a bad state?

A Yes.

Q What brought you to that conclusion?

A Well, he gets to the point where he stops making sense and doesn't follow conversation, so I sort of had an eye signal with my wife, and that's when we said, "Well, maybe you guys should get going. It's still daylight. Renee has had a long day."

...

Q So your wife's nod to you was your -- it was your cue to get your drunk friend out of your house?

A Yes.

[22] Following this the evidence confirms that the defendant, Mr. Pitman, accompanied the plaintiff and the third party into the home and the intention was for them to depart down the interior staircase of the residence. The plaintiff and the third party had previously used those stairs when visiting the defendants' residence on prior occasions. Upon reaching the interior stairs, the plaintiff fell down upon negotiating the first step. Following the fall, the defendant, Mr. Pitman, immediately provided some assistance to the plaintiff. The plaintiff was taken directly to the hospital by the third party.

[23] The plaintiff spent some approximately 18 days in hospital following the fall. The nature of the injuries and the consequences, if any, arising from them are clearly not before the court on this application. However, it is reasonable to assume for the purposes of this application that the plaintiff sustained some injury as an 18-day hospital stay is not trifling. The defendant, Mr. Pitman, indeed visited the plaintiff during the course of his stay at the hospital and acknowledges that the plaintiff was injured, albeit his evidence was that at the time of the visit to the hospital he was not aware of the specific injuries the plaintiff sustained.

- [24] The further relevant facts are that the defendant, Ms. Riopelle, fell down the same staircase in November of 2017. The circumstances of Ms. Riopelle's fall appeared to be different and there is nothing, at least on the evidence presented thus far, to suggest that Ms. Riopelle was intoxicated. Her evidence to date, and obviously subject to the finding of the trial judge after cross-examination, is that she slipped while following her husband, Mr. Pitman, who was upset as their dog had passed away that day.
- [25] What further makes the situation somewhat unique is that Ms. Riopelle did not just fall down the staircase and proverbially "dust herself off at the bottom" as no doubt many individuals have done from time to time within their own residence. Ms. Riopelle did sustain an injury to her hip, for which she ultimately sought medical attention and, albeit sometime down the road, had surgery for in order to remedy the lingering consequences of the injury. The plaintiff was apparently not advised of the defendant Ms. Riopelle's fall down the stairs prior to his own fall down those same staircase.
- [26] The plaintiff, while not specifically offered the option of departing through the exterior stairs of the residence, including those upon which he used to enter the residence on the night in issue, acknowledges in his examination for discovery evidence that he was not evicted from the defendants' residence. It was thus open to him to ask or elect to use another set of stairs other than the interior stairs on which he fell.

The Test for Amending Pleadings

- [27] The defendants in their application response concede that the threshold for success on an application to amend pleadings is low. The defendants further refer to the decision of this court in *Coburn and Watson's Metropolitan Home v. Bank of America Corp.*, 2016 BCSC 2021, which stands for the proposition that leave to amend pleadings should not be allowed under British Columbia Supreme Court Civil Rules if "(a) the proposed amendment discloses a new cause of action beyond the expiration of the limitation period; (b) the proposed amendment is clearly invalid at law; or (c) the prejudice will be caused to the other party."
- [28] The defendants do not assert that (a) is applicable. The amendment proposed to seek additional heads of damage for the same causes of action in the original notice of civil claim, which was clearly filed within the applicable limitation period. The defendants also do not assert that (c) is applicable. Examinations for discovery have been conducted. Although I do not necessarily see how additional examinations would be required if the pleadings are amended as proposed, there is clearly more than enough time to complete those examinations prior to the currently anticipated trial date. There are also no expert reports, as I understand, to date. There is thus not any apparent prejudice of any sort. Rather, the defendants rely on (b), namely that leave to amend the notice of civil claim should be denied because the ostensible basis for the proposed amendments are clearly invalid at law.

The Relevant Law

- [29] In asserting that the proposed amendments are invalid at law, the defendants rely most significantly on the Supreme Court of Canada decision in *Childs v. Desormeaux*, 2006 SCC 18.
- [30] *Childs*, as I will refer to it, is the leading case in Canada on the relationship between social hosts and their guests. The court held that in a situation involving a social host with adult guests where alcohol is either served by a host or supplied by a guest, there is no positive duty to act that is created when alcohol is consumed (see in particular paras. 41, 44 and 47 of *Childs*.)
- [31] The factual circumstances in *Childs* are somewhat distinguishable as it involved a potential claim by a third party user of a road (i.e., passenger in a car) against a social host where a guest at a party hosted by the social host drove from the party and injured the third party severely while driving. The court stated that proximity must first be assessed between the social host and their guest before moving on to the proximity nexus between the social host and a third party claimant. The outcome of this analysis continues to govern in all circumstances of social hosts whether claims are made by guests or third parties (see para. 34).
- [32] The Supreme Court of Canada further held that a positive duty to act may exist if the foreseeability of harm is present and if other aspects of the relationship between the plaintiff and the defendant established a special link or proximity. Three such situations have been identified by the court. Those are addressed in particular at paras. 34 to 37 of *Childs*.
- [33] At para. 41 of *Childs*, Chief Justice McLachlin, as she was then, said the following:
- 41 Does the situation of the social host who serves alcohol to guests fall within the three categories just discussed or represent an appropriate extension of them having regard to the factors of risk-control and reasonable preservation of autonomy that animate them?
- Chief Justice McLachlin ultimately concluded that it does not.
- [34] Of note, *Childs* does stand for the proposition that a private social gathering at a private residence where alcohol is served is not a highly risky activity. In particular, at para. 42 of *Childs*, the following quote appears:
- . . . Risks may ensue, to be sure, from what guests choose to do or not do at the party. But hosting a party is a far cry from inviting participation in a high-risk sport or taking people out on a boating party. A party where alcohol is served is a common occurrence, not one associated with unusual risks demanding special precautions. . . .
- [35] The court in *Childs* also addressed the need to preserve the legal autonomy of adults in social host situations; in particular, at para. 45, includes the following quote:

. . . A person who accepts an invitation to attend a private party does not park his autonomy at the door. . . . Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. . . .

[36] The defendants further rely on the very recent decision of this court in *Sidhu v. Hiebert*, 2022 BCSC 1024. In that case, the court reviewed *Childs* and made the following comment at para. 142:

An individual who attends a private party does not park their autonomy at the door. They remain responsible for their conduct and choices. There is no reason to impose the costs of those choices on others, . . .

[37] In *Sidhu*, this court applied *Childs* and rejected that the circumstances in *Sidhu* created a positive duty to act, despite the social host knowing that the guest was intoxicated (see paras. 233 and 234).

[38] In the application response the defendants note that in *Sidhu* the court reached the following conclusions:

- a) The social host was under no obligation to assess an individual's state of intoxication and then refuse them entry to their home (para. 221);
- b) The social host was under no obligation to take away the guest's car keys upon arrival (para. 222);
- c) The social host was under no obligation to monitor guest's alcohol consumption, particularly where the social host was also consuming alcohol (paras. 223, 224);
- d) The social host was not obligated to take keys from their guest at departure when they declined the offer of a taxi being called (para. 227); and
- e) The social host was not obligated to call the police on the guest (para. 228).

[39] The court in *Sidhu* also considered the evidence of whether the overt act of providing a drink to a guest was sufficient to establish the requisite proximity between the social host and guest to create a duty of care. The court found it was not, albeit referencing what is obiter in *Childs*.

Conclusion

[40] As described above, counsel for the defendants makes some compelling arguments relying on Supreme Court of Canada authority which is binding on this court, such authority having been recently applied as noted by this court in the *Sidhu* decision.

- [41] The plaintiff's case on liability is certainly not an easy one. Simple negligence, if proven, will not lead to an award of punitive or aggravated damages because it is unintentional or neglectful rather than malicious, oppressive, high-handed, requiring deterrence and so forth. There are also significant issues arising from the cases set forth above regarding social host liability. I will not reiterate them again.
- [42] The genuine difficulty for this court is that the defendants are, I conclude, ultimately trying to have a trial or at least a partial trial of the matter in the guise of opposing an application to amend the pleadings. On an application to amend pleadings, based on the Coburn decision cited by the defendants and expressively referred to above, leave should only be refused if the proposed amendment is clearly invalid at law. In repeating that quote again, I want to refer to the important use of the word "clearly". An amendment that is invalid at law, if the other criteria are not engaged such as here, should be allowed and the matter should be put to the trial judge for consideration upon all the evidence and fulsome submissions. It is only if it is clearly invalid at law that amendments should be refused at the interlocutory stage.
- [43] In applying these principles, it is trite law that aggravated and special damages are routinely awarded when appropriate in all the circumstances by this court. Certainly, it is a very high threshold to obtain such heads of damage. The plaintiff indeed acknowledges this in the notice of application and appropriately cites the Supreme Court of Canada decisions in *Hill v. The Church of Scientology*, [1995] 2 S.C.R. 1130 and *Whiten v. Pilot Insurance*, 2002 SCC 18 in their own notice of application, which clearly and very articularly make this point.
- [44] The defendants refer to several additional helpful cases on this, including the recent decision of this court in *Thomson v. Friedmann*, 2008 BCSC 703, but ultimately the law on where these heads of damages can be awarded and are appropriate by this court is well-established.
- [45] Of note, however, aggravated and special damages have been previously sought in claims brought pursuant exclusively under the Occupiers Liability Act (legislation already pled by the plaintiff in the existing notice of civil claim). Although, on an admittedly unexhaustive review of all of the cases in all jurisdiction, those claims appear to have been generally unsuccessful on their merits. This is not inconsistent with the above note that the threshold to obtain said heads of damages is very high. I will note three specific examples that the court was able to locate.
- [46] In *Charles v. 0804656 B.C. Ltd.*, 2019 BCSC 763, the plaintiff appealed Provincial Court decision not to award punitive damages for his successful claim in a breach of occupier's duty. The court dismissed the appeal after finding the defendant had done nothing directly or indirectly worthy of punishment through punitive damages.

- [47] In *Van Hartevelt v. Grewal*, 2012 BCSC 658, the court awarded punitive damages against some defendants for assault and battery, but not against others found to be liable vicariously under the Occupiers Liability Act. The court stated that punitive damages are not appropriate "absent specific reprehensible conduct on the part of that party" in the case of vicarious liability without specifically addressing the issue of punitive damages under the Occupiers Liability Act. The relevant paragraphs in that case are 48, 69, 73 and 98.
- [48] Finally, in *Paskalidis v. Caprice Hospitality Inc.*, 2011 BCSC 1699, the court considered granting aggravated or punitive damages in an Occupiers Liability fact pattern, but again declined to do so (para. 72).
- [49] Most importantly, though, is that nothing in the case law the court could locate following the hearing of this application says that pleas for punitive or aggravated damages in claims brought pursuant exclusively to the Occupiers Liability Act or concurrently with other causes of action for liability and the Occupiers Liability Act are inherently frivolous, vexatious, or wholly doomed to fail. In other words, there is nothing which supports the conclusion that they are "clearly invalid", which as noted above is the governing law on this point as acknowledged by counsel for the defendants in their application response.
- [50] On this basis, and having regard to the law recited above, again regarding the test under the British Columbia Supreme Court Civil Rules, namely R. 6-1 for the amendment of pleading, I have concluded that the additional amendments to the notice of civil claim as presently sought should be allowed.

Costs

- [51] As the plaintiff has been substantially successful in this application to amend the pleadings, the plaintiff shall be entitled to costs of this application. Those shall simply be costs in the cause as it remains very much a live issue as to whether the additional heads of damages now permitted to be sought in a further amended notice of civil claim can be proven having regard to the binding authority from the Supreme Court of Canada in *Childs* referred to above and the relevant factual matrix.
- [52] However, as I cannot conclude that they are clearly invalid, they shall be permitted to be advanced at trial.

Bifurcation

- [53] As a final note, I will make again the suggestion to counsel as mentioned at the hearing of this application that they consider bifurcating the issues of liability and damages for efficiency and to secure an earlier trial date. This incident happened in June of 2019. The anticipated trial, assuming there is a courtroom and a justice available, will not commence until July of 2025. That is a considerable delay, and although counsel has been diligent in conducting examinations for discovery already, there is a genuine risk that the parties' memories of the relevant events of June 22, 2019 will further fade in the remaining almost

three years until trial.

[54] In making this suggestion, which is entirely obiter dicta, I do recognize the concern raised by counsel for the defendants as to the live issue of credibility. However, credibility issues do not preclude bifurcation in civil matters. Where credibility issues may obfuscate factual findings that are relevant to both liability and damages, it does potentially preclude severance of those issues, particularly where a party applies to sever a liability from damages and determine that first issue by way of a summary trial. Where credibility poses a particular concern in that situation, nonetheless the court has still granted applications for bifurcation on many occasions in personal injury matters.

[55] I simply reference the following three authorities which the court could locate: *Thomas v. The Roman Catholic Archbishop of Vancouver*, 2016 BCSC 1466; *Spiering v. Trevor*, 2012 BCSC 1653; and *Charlie v. Canada Safeway Limited*, 2010 BCSC 618, affirmed by the Court of Appeal in 2011 BCCA 202.

[56] Those are my reasons for judgment.

"Hardwick J."

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