CANADA / JUDGMENT

# Henderson v. Mawji

## 2020 BCCA 43

COURT
British Columbia Court of Appeal

DECIDED
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2020 BCCA 43 Henderson v. Mawji COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Henderson v. Mawji, 2020 BCCA 43 Date: 20200113 Dockets: CA46535; CA46536 Docket: CA46535 Between: Nicole Christine Henderson Appellant (Plaintiff) And Gulzar Mawji Respondent (Defendant)

- and - Docket: CA46536 Between: Nicole Christine Csurdi Appellant (Plaintiff) And Katelyn Bannon Respondent (Defendant) Before: The Honourable Madam Justice Garson (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated October 31, 2019 (Csurdi v. Bannon, 2019 BCSC 2280, New Westminster Dockets M193837 and M172624). Oral Reasons for Judgment Counsel for the Appellant: T.P. Harding Counsel for the Respondents: D.J. Sinnott Place and Date of Hearing: Vancouver, British Columbia January 8, 2020 Place and Date of Judgment: Vancouver, British Columbia January 13, 2020 Summary: The appellant applies to extend time to serve notices of appeal in two related actions. Held: Applications dismissed. The appellant concedes that the only point of the appeal is to argue that an evidentiary ruling from the trial below should not bind a new trial. However, previous evidentiary rulings do not bind new trials. As a result, the proposed appeal lacks merit.

[1] GARSON J.A.: These are applications before a single justice in chambers to extend time to serve notices of appeal in two related actions. The notices of appeal were served four days late.

[2] The appellant in both actions is the same person. She now uses the name Nicole Christine Henderson.

[3] The criteria that govern this application to extend time pursuant to s. 10(2)(d) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, are set out in Davies v. Canadian Imperial Bank of Commerce (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.):

1. Was there a bona fide intention to appeal?
2. When were the respondents informed of the intention?
3. Would the respondents be unduly prejudiced by an extension of time?

4. Is there merit in the appeal?

5. Is it in the interest of justice that an extension be granted?

[4] The merits threshold asks whether the appeal is "doomed to fail," or, alternatively, whether "it can be said with confidence that the appeal has no merit": Stewart v. Postnikoff, 2014 BCCA 292 at paras. 5-6 (Chambers).

[5] The final factor "encompasses the other four questions and states the decisive question": Davies at 260. As a result, the merit of an appeal is also considered at that stage. In A Solicitor v. The Law Society of British Columbia, 2018 BCCA 163 at para. 37, Bennett J.A. held that it "is not in the interests of justice to permit a meritless appeal to go forward."

[6] It is only the fourth and fifth criteria that are of concern in this application.

[7] The underlying appeal is from an order in two personal injury actions. The trial judge pronounced a mistrial. As a result of the mistrial, the jury was discharged, and the judge ordered a new trial. The question that arises on these facts is whether there is any utility to the appeals.

[8] The appellant contends that in the trial the judge ruled that certain evidence concerning the plaintiff's history of childhood abuse was irrelevant, prejudicial, and therefore inadmissible. The appellant says the point of the appeal is to argue that the judge erred in his ruling and, importantly, that the ruling should not bind or carry forward to the new trial.

[9] Apart from the appellant's concern about the implications of the evidentiary ruling on the new trial, the appellant concedes there is no point to the appeal.

[10] The other criteria in Davies, as to the appellant's intention to appeal, notice to the respondents, and lack of prejudice to the respondents, are all satisfied. As I said, the extension is only for four days. Counsel for the applicant concedes that on appeal his only claim for relief is a new trial, and that Justice Mayer has already ordered a new trial. But he says underlying that order for a new trial is an erroneous evidentiary ruling. He is concerned that the judge hearing the new trial will be bound by the evidentiary rulings made at the trial that ended in a mistrial. The respondents say there is no utility to this appeal and the extension ought not to be granted. Because an appeal is from an order and not reasons, I conclude, and agree with the respondents, there is no utility and, hence no merit, to the appeal.

[11] The appeal is also ill-conceived because the underlying evidentiary rulings do not bind the new trial judge.

[12] In Coulter v. Ball, 2007 BCSC 720, Goepel J. (as he then was) explained the law as it pertains to a new trial following a successful appeal:

[19] Where a new trial is ordered, the judge presiding at the new trial is not bound by findings made at the first trial. A new trial is wholly independent of the first: Bobolas & another v. Economist Newspaper Ltd., [1987] 3 All E.R. 121 (C.A.).

[20] At a new trial, all questions of fact in regards to the issues retried are at large and are to be considered afresh: Lewis v. Cook and Akenhead, [1950] 4 D.L.R. 136 (B.C.C.A.). The issues are considered tabula rasa. The parties may raise any issue pled regardless of the position taken at the first trial: Confederation Life Insurance Co. v. Woo (1994), 123 Sask. R. 150 (C.A.).

[13] Lewis v. Cook and Akenhead, [1950] 4 D.L.R. 136 (B.C.C.A.), mentioned by Goepel J. in Coulter and followed in Confederation Life Insurance Co. v. Woo (1994), 48 A.C.W.S. (3d) 1019 (Sask. C.A.), provides the following guidance on the effect of a new trial:

[11] We are all of the opinion that the only order we can make is that there should be a new trial. We are of the opinion that the learned Judge who may take the second trial is, and should be, absolutely untrammelled by any decision of the learned Judge who took the first trial, and on that I wish to refer to two cases. The first case is Roe v. Naylor (1918), 87 L.J.K.B. 958, 119 LT 259. The Master of the Rolls said at p. 963: Counsel for the appellants sought to rely upon some finding of the Judge in the first trial of the action. In my opinion, he is not entitled to do that. This action was sent for a new trial, and the second trial superseded the first, and any finding in the first action was got rid of when the action was sent for a new trial.

[12] Now that refers apparently to a finding of fact. The next case I am about to state refers to a question of law -- Venn v. Tedesco, [1926] 2 K.B. 227, 95 L.J.K.B. 866. McCardie J. said at p. 237: Such is the view I must take of the main point of law argued before me, but I ought, ere concluding this judgment, to refer briefly to another point raised on the plaintiff's behalf--namely, that, inasmuch as the defendants' counsel, at the first trial of this action before the Lord Chief Justice and a special jury, stated that he did not seek to rely on the Public Authorities Protection Act, 1893, he was therefore precluded from raising the point before me on the second trial of the action. I am unable to agree with that contention. The point was one of law only. It involved no evidence, and the facts on the point were not only admitted, but were actually pleaded in the statement of claim itself. There is, I think, no estoppel in the matter. The trial before me was a de novo hearing, and the defendants were entitled to raise before me the point pleaded in their statement of defence. My recollection is that this question has been decided by the Court of Appeal as I now decide it, though I am unable to find a reported decision on the matter. The cases quoted in the Annual Practice, 1926 ed., p. 1154, tend, I think, to support the view I now express.

[14] I agree with Goepel J. in Coulter and can see no reason why these same principles would not apply equally in respect of an evidentiary ruling at a new trial following a mistrial (as opposed to an appeal).

[15] Similarly, although not binding, in a criminal context guidance may be found in R. v. Hilson, [1958] O.R. 665 (C.A.). The court allowed an appeal from a murder conviction on the basis of errors in the jury charge and remitted the matter for a new trial. In so doing, it noted that it found no error in the trial judge's decision to admit a confession. Nevertheless, it cautioned that this ruling was not binding on the retrial: at paras. 3-4.

[16] That principle was endorsed in R. v. Duhamel, 1981 ABCA 295 at para. 23, aff'd, [1984] 2 S.C.R. 555. In R. c. Cliche, 2010 QCCA 408, Beauregard J.A. considered whether Hilson and Duhamel applied in respect of a retrial following a mistrial, as opposed to an appeal. He found no principled reason for distinguishing between the two situations, at paras. 13-17.

[17] Edwards J. also appears to have reached the same conclusion in H.M.T.Q. v. Dempsey, 2001 BCSC 371 at para. 7, where he applied Hilson in relation to a retrial following a mistrial.

[18] Parenthetically, I recognize that in relation to criminal matters, Cliche and Dempsey have been overtaken by legislative developments. In 2011, the Criminal Code, R.S.C. 1985, c. C-46 was amended to include s. 653.1: Mistrial -- rulings binding at new trial 653.1 In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the Canadian Charter of Rights and Freedoms that were made during the trial are binding on the parties in any new trial if the rulings are made -- or could have been made -- before the stage at which the evidence on the merits is presented.

[19] Parties to a retrial are entitled to reframe their case. They may choose to adduce different evidence and advance different legal arguments, subject only to the limitations imposed by their pleadings and the doctrine of abuse of process. In those circumstances, the analysis of relevance, materiality, and probative value of a given piece of evidence may be fundamentally different than in the previous trial. The reasoning in the criminal authorities to which I have referred, while not directly applicable, is persuasive.

[20] It follows that I would, in these circumstances, dismiss the applications for the extension of time on the grounds that there is no merit or utility in the appeals and, consequently, it is not in the interests of justice that either of these applications for extensions of time be granted.

## Disposition

[21] The applications in both appeals to extend time to serve notices of appeal are dismissed. Both appeals stand dismissed. "The Honourable Madam Justice Garson"

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