

CANADA / JUDGMENT

Hynes v. Westfair Foods Ltd

2008 BCSC 637

COURT

Supreme Court of British Columbia

DECIDED

16 May 2008

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2008 BCSC 637 Hynes v. Westfair Foods Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hynes v. Westfair Foods Ltd,

2008 BCSC 637

Date: 20080516

Docket: S94524

Registry: New Westminster

Between:

Dorothy Hynes

Plaintiff

And:

Westfair Foods Ltd.

(carrying on business as "The Real Canadian Wholesale Club")

Defendant

And:

Canbra Foods Ltd. and Westbridge Packaging Ltd. and

Westbridge Pet Containers Limited

Third Parties

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiff

W. Clements

Counsel for the Defendant

I. Hallam

Counsel for Canbra

S. Twining

Counsel for Westbridge

K. Gourlay, Articled Student

Date and Place of Trial/Hearing:

May 6, 2008

New Westminster, B.C.

INTRODUCTION

[1] The plaintiff applies for four orders pursuant to Rules 1(5), 5(6), 22(18), 22(19), and 39(29) of the Supreme Court Rules, B.C. Reg. 221/90:

1. An order that the third party issue is to be tried separately;
2. An order that the trial of liability be separated from the trial of damages and proceed first, the latter to proceed only if necessary;
3. An order that paragraph 9 and Exhibit "Y" of Affidavit #1 of Andrea Zappavigna dated April 14, 2008 be struck on the ground that it contains privileged material; and
4. Costs

[2] The defendant and the third parties oppose the orders sought by the plaintiff on the ground that the circumstances do not warrant the exercise of judicial discretion in favour of either severance of the third party issues or severance of liability and damages as between the plaintiff and the defendant. Further, the defendant opposes the plaintiff's claim that the assertions of fact contained in the affidavit of Andrea Zappavigna are privileged.

BACKGROUND

- [3] On September 6, 2004 the plaintiff was shopping at the defendant's store when she slipped on a puddle of vegetable oil and injured her right knee. As a result of this injury the plaintiff was required to undergo physiotherapy for a number of weeks and had restricted mobility. The plaintiff had a pre-existing heart condition and, as a consequence of her inability to engage in regular exercise, the plaintiff claims that her cardiac condition deteriorated to the point where she required heart transplant surgery and suffered liver failure.
- [4] After the heart transplant surgery the plaintiff was only able to breathe with the assistance of a respirator and required a wheelchair to move more than a short distance. She undergoes kidney dialysis three times per week and is thus only able to attend court for short periods. The plaintiff's physicians advised her that her condition may deteriorate at any time and that her life expectancy is greatly reduced because of her heart transplant and other health complications. The plaintiff is currently 58 years old.
- [5] The plaintiff's husband, Lloyd Hynes, deposes that his annual salary is \$74,160 and he also receives a disability pension of \$11,243.40 per year. He is sixty-three years old and will retire in October 2009 and his income will then be \$25,643 per year. Mr. Hynes deposes that his income is unlikely sufficient to fund the ten-day trial that is currently set for September 2009, particularly because of the cost of expert medical witnesses required to prove the plaintiff's damages claim.
- [6] The defendant claims liability will involve issues as to whether its employees had prior knowledge of the spill, whether there was a warning cone posted at the spill location, and whether its employees chose to clean up another spill in priority to the oil spill that caused the accident. In regard to damages, the defendant takes the position that the plaintiff suffered a minor knee injury as a result of the fall and that any other health difficulties were merely the natural consequence of a serious pre-accident condition.
- [7] The third party claim involves two parties: Canbra, a company that manufactures food containers; and Westbridge Pet Containers, the company that subcontracted from Canbra the work of manufacturing the container used to package the vegetable oil involved in this case. In the third party claim, the defendant alleges that Canbra and Westbridge were negligent in the design, manufacture or handling of the container. Essentially the allegation against the third parties is that there was a leak in the container that was caused by a defect for which the defendant is not responsible.
- [8] The offending paragraph found in the affidavit of Ms. Zappavigna contains an excerpt from a letter dated August 24, 2005 from counsel for the plaintiff to the defendant which provides as follows:

To begin, the liability of Westfair Foods Ltd. is clear. Our investigations indicate that store employees were aware of the spilled oil prior to Ms. Hynes' fall, but failed to take any steps to address the spill or place any warnings of the hazard. Moreover, we understand that the spilled oil was caused by a container being punctured by a store employee who was restocking the shelf and had cut open the front of a box after placing it on the shelf, as is the store practice.

- [9] Part of the same passage is also included in exhibit "Y" of Ms. Zappavigna's affidavit which is a letter from counsel for the defendant to counsel for the plaintiff dated February 8, 2007.
- [10] There is no dispute that the passage quoted above came from a letter exchanged during settlement discussions at a time when litigation was either contemplated or the action had already been commenced.

SEVERANCE OF THE THIRD PARTY CLAIMS

- [11] The plaintiff argues that Rules 1(5) and 22(18) and (19) provide the court with a discretion to sever the trial of a third party proceeding in order to avoid prejudice or unnecessary delay to the plaintiff. In this case the plaintiff maintains the trial will be lengthened significantly by third party proceedings which will explore the design, manufacture, and handling of the subject container and necessarily involve expert evidence. Because of the plaintiff's poor health, she will be prejudiced by the delay that will result from complicating the trial of the main action. The plaintiff argues that the trial will be extended by at least one or two days due to the third party proceedings. Lastly, the plaintiff says the third parties will suffer no prejudice if these proceedings are severed because the issues raised are unrelated to the issues in the plaintiff's action against the defendant.
- [12] Canbra argues the plaintiff has not met the test for severance of the third party proceeding set out in 577519 B.C. Ltd. v. Weyerhaeuser Co., 2004 BCSC 670, Schaper v. Sears Canada, Inc., 2000 BCSC 1575, 81 B.C.L.R. (3d) 342, and Buttar-Bains v. Canada (A.G.), 2003 BCSC 1779. In particular, Canbra argues trying the claims together will not unduly complicate the issues, delay the hearing or otherwise be inconvenient.
- [13] Canbra maintains that a severance of the third party proceedings will only shorten the liability portion of the action and will have no bearing on the issue of damages, which is the more complicated and time consuming issue according to the plaintiff's admission. Considering that the trial is not overly lengthy at ten days, and that most of the trial time will be devoted to the question of damages, Canbra argues there will be no undue delay or prejudice to the plaintiff.

- [14] Canbra also maintains the liability issue as between the plaintiff and the defendant is intertwined with the liability issues raised in the third party proceedings. While the defendant argues it was a defect in the container that caused the spill, Canbra maintains the accident was caused by the negligence of the defendant's employees. If the third party proceedings were heard separately, there would be a duplication of evidence in regard to the accident and its cause, thereby raising the possibility of inconsistent findings of fact
- [15] Westbridge Pet Containers adopts the submissions of Canbra and says that their defence to the action will necessarily involve the mechanics of the accident. Regardless of whether there was a design flaw in the container, Westbridge will attempt to establish that the defendant's employees were negligent in failing to clean up the spill once it became known to them. As a consequence, it is argued that there will be an overlap in the evidence called if the trials are severed.
- [16] The defendant also opposes severance of the third party proceedings. The defendant argues that because the third party may be liable to indemnify it in respect of damages awarded to the plaintiff, they are also vitally interested in the question of quantum and should therefore be a party in the main trial.
- [17] The relevant Supreme Court Rules describing the court's discretion to order a separate trial for a third party proceedings are as follows:

Rule 5(6)

Where a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings or make any other order it thinks just.

Rule 5(7)

Where a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the court may so order.

Rule 22(18)

The court may impose terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by the plaintiff as a result of that third party procedure.

Rule 22(19)

An issue between the party filing the third party notice and the third party may be tried at the time the court may direct.

- [18] The leading authority on the application of these Rules in response to a request for severance of a third party proceeding is the decision of Master Groves (as he then was) in Schaper. The factors to be weighed are outlined at ¶19 of that judgment:

While not intending to create an exclusive test, the case law that I have reviewed suggests that the following factors should be considered:

1. Is there prejudice as set out in Rule 5(6), to the parties applying to sever matters if the court does not exercise its discretion to sever? Clearly, to satisfy this test, the party making the request must show that hearing the claims together would unduly complicate, delay the hearing, or otherwise be inconvenient. If a party applying does not meet this threshold, the court need not go further in any analysis and the application should be dismissed.
 2. Have the actions of any party in the proceeding been unreasonable and have they contributed to the complication, the delay, or the inconvenience alleged by the party applying? If this [is] found, that would strengthen the argument to sever.
 3. Are the issues between the plaintiff and defendant and the issues between the defendant and the third party sufficiently distinct so as to allow them to be tried separately? If so, that strengthens the argument to sever off third party proceeding.
 4. Is the relief claimed by, or the potential obligation of, any party best determined by hearing the evidence of all parties at one hearing? If so, that weakens an application to sever.
 5. Does the prejudice to the party applying, based upon undue complication, delay or inconvenience, outweigh any benefit of matters being heard together, or outweigh any considerations related to the overall objective of the rules to ensure a just, speedy and inexpensive determination of every proceeding on its merits, including the avoidance of a multiplicity of proceedings for the benefits of litigants and having concern to congestion in the courts generally?
- [19] There is no doubt that the trial will take longer and there will be more issues surrounding the assessment and apportionment of liability if the third party proceeding is not severed from the primary action. In addition, I accept the plaintiff's submission that her poor physical health will make any trial extremely difficult to manage regardless of its length. Nevertheless, I am not satisfied that allowing the third party claims to be tried along with the primary action will cause undue prejudice or inconvenience to the plaintiff.
- [20] There is no evidence that the third party proceeding will delay the ten-day trial now set for September 2009 in the sense that later dates must be secured to accommodate the third parties. Further, the plaintiff estimates one or two days may be added to the trial to address issues raised by the third party proceedings. In my view, this is not a substantial increase causing undue inconvenience to the plaintiff even if one considers her poor physical health. It is apparent that the plaintiff will not attend the trial continuously in any event because of her requirement for dialysis. While the defendant's witnesses may be subjected to a lengthier cross-examination by the third parties, it does not appear that their defences relate to the plaintiff's actions or knowledge.

- [21] I am also satisfied that the liability issues involved in the third party claim are not distinct from those raised between the defendant and the plaintiff. The third parties will be defending on the basis that regardless of any design flaws in the oil container, it was the negligence of the defendant's employees that caused the spill and led to the accident due to the failure to clean it up in a timely manner. Thus if the third party proceeding was severed from the primary action, there would be a duplication of evidence in both trials with the possibility of conflicting evidentiary findings.
- [22] Accordingly, based on the factors outlined in Schaper, I find the plaintiff has not made out a case for severance of the third party proceeding.

SEVERANCE OF LIABILITY AND DAMAGES IN THE MAIN ACTION

- [23] The plaintiff argues that liability in this case will encompass a fairly routine inquiry into the standard of care exercised by the defendant in respect of the oil spill, but that the matter of damages will be more complicated due to the theory of causation raised by the plaintiff. While liability will be fairly straightforward and involve only a few lay witnesses giving relatively short evidence, the damages portion of the trial will be lengthy and will involve several expert medical witnesses, numerous documents and medical reports, as well as actuarial evidence.
- [24] Because of the plaintiff's serious medical condition and her lack of resources to fund a long trial and pay for several expert reports, counsel argues the question of liability should be severed and the matter of damages go to trial only if necessary. If the plaintiff loses the liability issue, she will not have wasted her limited resources on a lengthy trial addressing damages. If she is successful on liability, then it is more likely the parties will settle the question of damages essentially because at least one issue has been clarified.
- [25] In support of her argument, the plaintiff relies upon Rules 1(5) and 39(29) which grant the court a discretionary power to sever the issue of liability from damages. She also relies upon *Hemmerling (Litigation Guardian of) v. Hole*, 2005 BCSC 35, *Anderson v. University of British Columbia* (1990), 51 B.C.L.R. (2d) 393 (S.C.), and *Fagervik (Guardian ad litem of) v. Dzaman*, [1996] B.C.J. No. 3159 (S.C.) (QL).
- [26] The plaintiff argues this is an extraordinary and exceptional case requiring severance because she is extremely ill and there is a significant risk she will be too ill to testify during a lengthy trial, the issues raised in regard to liability are distinct from the issues of causation in the damages claim, she lacks the economic resources to finance a trial combining liability and damages, credibility is not in issue, and the trial is not complicated by the presence of a jury.
- [27] The defendant argues the plaintiff has failed to prove this is an exceptional case requiring the court to exercise its discretion in favour of severance. While there is no dispute that the plaintiff sustained an injury to her knee, the question of negligence on the part of the defendant's employees is in issue. This dispute will essentially come down to an assessment

of the credibility of the plaintiff and her witnesses compared to the credibility of the defendant's witnesses. In particular, whether the employees knew of the oil spill and failed to take any action, whether there was a warning cone present, and whether the container was punctured by an employee are all issues to be determined. The defendant also submits that the plaintiff's theory of causation in respect of her serious health condition will depend upon an assessment of her credibility. While the medical experts will provide opinions on the matter of causation, the underlying basis for their opinions will be statements made to them by the plaintiff concerning her medical history and the chronology of events after the accident.

- [28] Because the plaintiff's credibility on the matter of liability will have an impact on the assessment of credibility in respect of the damages claimed, severance of these issues will prejudice the defendant. The defendant also maintains the plaintiff's health does not warrant severance of liability and damages. In particular, the defendant says the plaintiff's condition is far less serious and debilitating than in the Anderson case.
- [29] Further, the defendant argues that although the plaintiff claims her financial situation does not permit her to fund a long trial, the material filed in support of his claim is deficient. Mr. Hynes' letter does not address whether he has any savings or assets that may be used to fund the litigation. Nor does the material identify the anticipated cost of the expert witnesses and their reports. The defendant also argues there is no evidence the plaintiff sought alternate counsel willing to take the case on a contingency basis: *Sather v. Rousseau*, 2006 BCSC 264.
- [30] Lastly, the defendant argues it must be at least probable that a determination of the liability issue will put an end to the action before severance should be granted. If the plaintiff loses on the liability issue, there will clearly be no trial on the question of damages. However, the defendant argues the converse is not true. Damages are hotly contested due to the plaintiff's theory of causation and the quantum she claims.
- [31] In support of its arguments the defendant relies upon *Westwick v. Culbert*, [1992] B.C.J. No. 2121 (S.C.) (QL) and the authorities cited therein.
- [32] The Supreme Court Rule governing severance of liability and damages in a trial is Rule 39(29) which provides as follows:

Rule 39(29)

The court may order that one or more questions of fact or law arising in an action be tried and determined before the others, and upon the determination a party may move for judgment, and the court, if satisfied that the determination is conclusive of all or some of the issues between the parties, may grant judgment.

- [33] While there appears to be some divergence of opinion in regard to the test to be applied when considering an application to sever liability and damages, I am satisfied that the authorities support a higher onus on the plaintiff than merely showing it is just and

convenient. In my view, the plaintiff must show that they have an exceptional or extraordinary case in which either the trial of liability or damages will not be complicated, where the issues of liability and damages are not intertwined, and where there is some evidence that makes it at least probable that a separate trial on the issue of liability will put an end to the action: Sather at ¶45.

- [34] A review of the authorities cited by the parties indicates that litigants have established an exceptional case based upon very unfortunate health circumstances and/or an inability to finance a trial combining liability and damages. Sather and Anderson are both examples of where the plaintiff's case was characterized as exceptional because of extremely poor health or lack of funds to pay for a lengthy trial. In the case at hand, the plaintiff's medical situation is very troubling; she is on a respirator and requires a wheelchair. She undergoes dialysis three times per week. There is no question her health is frail and that she lacks the physical endurance required to manage a long trial.
- [35] On the other hand, while there is also evidence of the plaintiff's financial situation, I am not satisfied that she is in any worse position than most litigants. Her husband's income is over \$85,000 per year and there is no evidence the family is burdened by heavy debt. While Mr. Hynes is going to retire in a couple of years, there is no plan to do so before the trial in September 2009. Mr. Hynes' affidavit is also silent on whether the family owns real property that could be used to finance a trial. Lastly, there is no evidence of the actual or estimated costs associated with the disbursements necessary to marshal the required expert evidence. While Mr. Hynes deposes that two or more experts will be required for the trial, he provides no details of the monies expended to date for reports or the projected costs for future expenses of this nature. Without these details it is impossible for the court to determine whether a trial addressing both damages and liability is truly beyond the plaintiff's means.
- [36] I accept the plaintiff's submission that the question of liability will be relatively straightforward compared to the complicated issues of causation surrounding the damages claim. In addition, the defendant has not convinced me that the potentially overlapping credibility issues are a significant impediment to severance of liability. The plaintiff's credibility on the liability issue will be only a marginal consideration in the determination of damages. Because this is not intended to be a jury trial, the court may be asked to take into account any credibility findings from the first part of the trial and apply them to the damages determination should this become necessary.
- [37] Finally, there is the question of whether a separate trial on the issue of liability makes it at least probable that this will put an end to the action. The plaintiff argues this part of the test is satisfied by the obvious end to the action if she is unsuccessful on the question of liability. Further, the plaintiff argues that if she is successful on liability, a settlement of damages is more likely because at least one impediment to a resolution has been eliminated.

- [38] Addressing the first point raised by the plaintiff, if this factor was satisfied simply because the plaintiff may lose on the issue of liability thereby ending the action, then severance could theoretically be granted in every case. Severance of liability and damages must remain the exception rather than the rule. Accordingly, there must be some evidence that, if the plaintiff is successful on liability, the parties will probably settle the action.
- [39] Addressing the second point raised by the plaintiff, I find the only evidence before me is that it is highly unlikely the parties would settle the question of damages once liability is determined. The plaintiff's theory of causation raises complicated issues of fact and involves several, interconnected expert opinions. In addition, because causation is hotly disputed, the parties are far apart on the quantum of damages. The defendants take the position that the only injury suffered by the plaintiff was a minor knee injury requiring a few weeks for recovery. The plaintiff takes the position that the accident eventually led to her requiring a heart transplant and suffering from liver failure. Given these divergent views of the case, I am unable to conclude that settling the liability issue will result in a material increase in the chances of settling the entire claim.
- [40] Weighing these factors as a whole, I find that this is not a case where the arguments in favour of severance are compelling. A ten-day trial is not unduly long and the plaintiff has failed to prove that she lacks the money to finance the disbursements and fees required for a single trial addressing liability and damages. In addition, I am not satisfied that a trial addressing liability will substantially improve the chances of settling the entire action. While the plaintiff's health is clearly problematic, she will inevitably have to endure a ten-day trial if she is successful on liability. For these reasons I must deny the plaintiff's application.

WITHOUT PREJUDICE COMMUNICATIONS

- [41] The plaintiff argues that the passage from the letter written by counsel to the defendant is privileged because it contains statements made in contemplation of litigation and as part of settlement discussions. As a consequence, the statements contained in the letter cannot be used as evidence against the plaintiff for the purpose of this application or for any other purpose. In support of her application to strike out the offending passages, the plaintiff relies upon *Tompkins Estate v. Tompkins* (1992), 86 D.L.R. (4th) 759 (B.C.S.C.), *aff'd* (1993), 99 D.L.R. (4th) 193 (B.C.C.A.).
- [42] The defendant argues that even if the communication was privileged, admissions of fact contained in such communications are not protected and may be disclosed: *Milne v. Dorais*, [1999] B.C.J. No. 913 (S.C.) (QL) and *De Bathe v. T.A. Steadman Holdings Inc.*, 2001 BCSC 1817.

- [43] There appears to be no dispute that the letter written by counsel for the plaintiff was made for the purpose of effecting settlement and that the action was either in existence or at least contemplated at the time. These are the only pre-conditions required to establish that the communication is privileged. Once privileged, these communications are not admissible to prove any admissions contained in them: *De Bathe* at ¶67.
- [44] The privilege attached to without prejudice communications is designed to encourage settlement before trial. The courts assiduously protect the overriding public interest in favour of settlement. Further, the courts have consistently resolved the conflict between disclosure and privilege by shielding these documents from disclosure even when they contain admissions that are adverse to the party who made them.
- [45] The blanket protection from disclosure given to privileged settlement communications may be distinguished from documents created for the dominant purpose of litigation but which contain facts or assumptions that are relevant and otherwise admissible. In such cases the document itself may not be admissible but the facts contained in the document may be subject to disclosure at discovery or trial if they are otherwise admissible: *Milne* at ¶11. The so-called "litigation privilege" does not clothe all of the facts contained in the document with a privilege from disclosure simply because they are included in the solicitor's brief.
- [46] Accordingly, I grant the plaintiff's application to strike out paragraph 9 of the affidavit of Ms. Zappavigna and the reference to the impugned passage in exhibit "Y" of this affidavit.

COSTS

- [47] Costs to all parties will be in the event of the cause except that the plaintiff shall be entitled to costs in respect of the application to strike the offending portions of Ms. Zappavigna's affidavit, in any event of the cause, and at scale A.

"The Honourable Madam Justice Bruce"

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Prepared on 29 October 2026 · Esheria