
CANADA / JUDGMENT

Makowsky v. Doe

2007 BCSC 1865

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1865 Makowsky v. Doe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Makowsky v. Doe,

2007 BCSC 1865

Date: 20071224

Docket: M010224

Registry: Vancouver

Between:

Glen Makowsky

Plaintiff

And:

John Doe, Harminder Kaur Jawandha and

Insurance Corporation of British Columbia

Defendants

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Plaintiff

Thomas Harding

Counsel for the Defendant, Harminder Kaur Jawandha

Vince Critchley

Counsel for the Defendant, Insurance Corporation of British Columbia

Travis Brine

Date and Place of Hearing:

December 14, 2007

Vancouver, B.C.

- [1] This is an application by the defendant Insurance Corporation of British Columbia ("ICBC") and the defendant Harminder Kaur Jawandha for an order dismissing claims for damages brought against the defendants in two separate actions.

The Accidents

- [2] The first arises out of an incident March 6, 1999. The plaintiff alleges that an unidentified vehicle executed a right hand turn through a stop sign without stopping. This manoeuvre caused the plaintiff to swerve in order to avoid a collision. As a result, his vehicle struck a pole and he sustained injuries.
- [3] The second incident occurred September 9, 1999. The plaintiff alleges that a Dodge pickup truck drove from a school parking lot across a playing field and struck the plaintiff while he was walking his dogs. One of the dogs was killed. The plaintiff claims he sustained a significant head injury.
- [4] These applications turn in part upon an interpretation of s. 24 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act"), as it was from 1997 until May 31, 2007. That section reads as follows:

24(1) If bodily injury to or the death of a person or damage to property arises out of the use or operation of a motor vehicle on a highway in British Columbia and

- (a) the names of both the owner and the driver of the motor vehicle are not ascertainable, or
- (b) the name of the driver is not ascertainable and the owner is not liable to an action for damages for the injury, death or property damage,

any person who has a cause of action

- (c) as mentioned in paragraph (a), against the owner or the driver, or
- (d) as mentioned in paragraph (b), against the driver,

in respect of the bodily injury, death or property damage may bring an action against the corporation as nominal defendant, either alone or as a defendant with others alleged to be responsible for the injury, death or property damage, but in an action in which the names of both the owner and the driver of the motor vehicle are not known or ascertainable, recovery for property damage is limited to the amount by which the damages exceed the prescribed amount.

- (2) Proceedings must not be brought against the corporation as nominal defendant under this section unless the person bringing them gives written notice to the corporation as soon as reasonably practicable and in any event within 6 months after the accident that caused the bodily injury, death or property damage.

The First Accident

- [5] The defendant ICBC says that the plaintiff failed to notify the corporation as soon as reasonably practicable after the accident. It points to the fact that the plaintiff did not report this accident to the police, and that at various times he has given various reasons for not reporting the accident to ICBC immediately. However, the plaintiff did report the accident to ICBC April 1, 1999, some three weeks after the incident.

- [6] His description of what happened at the scene is that having veered sharply to avoid the collision, his vehicle came to a stop over a piece of concrete that was apparently supporting a no parking sign. He said that during the violent movement his head "slammed into the roof of my vehicle, stunning me".

- [7] He described his condition in the following words:

I was very shaken up by this - both because my fear of crashing into the minivan and then immediately after being afraid I might drive into people at the bus stop. My heart was racing and I was shaking. I was cold and sweaty. I kept seeing the minivan ahead of me and the people at the bus stop. I was quite dazed and had trouble concentrating on what was happening.

- [8] He deposed that at first he did not report the matter to ICBC because he thought his injuries would resolve in a few days. However, when his pains did not go away he called ICBC on April 1, 1999. Eight days later he went into the corporation and signed a statement.

- [9] At the scene, the plaintiff was able to obtain the name of one witness. However, he did not provide the name of this witness to ICBC for some time, despite being requested to do so.

- [10] Did he report this accident to ICBC "as soon as reasonably practicable"? I am persuaded that he did. He reported it in three weeks. As can be seen from the above, he was clearly shaken up at the time of the accident. When he realized that his injuries were not going away, he promptly reported the matter to ICBC. From that point on, the insurance corporation was free to make any investigations that it wished.

- [11] I am satisfied that where a person sustains injuries that leave one in shock, and confused, it is not unreasonable for such person to concentrate upon whether the injuries will resolve before turning one's mind to reporting the matter to the insurance corporation.
- [12] Indeed, s. 24 sets out a maximum time of six months. Here, the report was within three weeks.
- [13] That concentration upon one's physical and/or psychological injuries may delay the operation of a limitation period has been recognized in the authorities: see *Holloway v. I.C.B.C. and Richmond Cabs and John Doe*, 2007 BCCA 175; *Jack v. Sidhu*, 2006 BCSC 1218.

The Second Accident

- [14] As noted above, the second incident took place on September 9, 1999. The plaintiff immediately took steps to ascertain the identity of the person driving the vehicle that was involved. He was able to obtain the licence number of that vehicle. He reported it forthwith to the RCMP. They investigated the matter.
- [15] Nevertheless, the plaintiff failed to report the matter to ICBC until December 13, 2000, 15 months after the accident.
- [16] This is puzzling because at the time of the second accident, the plaintiff had retained a lawyer who was representing him with respect to the first accident. It is surprising in these circumstances that the second accident, which on the face of it appears more serious than the first, was not reported to ICBC.
- [17] The plaintiff, then, is confronted with s. 24(2) and the words that the insurance corporation is to be notified "in any event within 6 months after the accident".
- [18] The wording of the statute is clear. The plaintiff has not brought to the attention of the court any case in which an action has been permitted to proceed in circumstances where written notice was not given to the insurance corporation within six months.
- [19] In the result, I conclude that the action against ICBC concerning the September 9, 1999 accident is statute barred.

The Defendant Jawandha

- [20] The defendant, Harminder Kaur Jawandha, states that the plaintiff's claim does not set out a cause of action against her and for this reason should be dismissed.
- [21] Brenner J. (as he then was) in *Alford v. Canada (Attorney General)* (1997), 31 B.C.L.R. (3d) 228 at para. 13 (S.C.), rejects the requirement that a cause of action be set out:

The Rules of Court contain no such express requirement; they only require a plaintiff to set out in the statement of claim the material facts on which he relies, together with the relief sought. While a statement of claim must disclose a cause of action, the Rules of Court do not mandate that the pleader identify the cause of action being advanced.

[22] The Court of Appeal affirms this decision in *Alford v. Canada (Attorney General)*, [1998] B.C.J. No. 2965 (C.A.) (QL), stating at para. 5:

I agree with Mr. Justice Brenner that it is not necessary for the respondents to plead specific causes of action. They must only plead material facts that can support one or more causes of action.

[23] In this case, the plaintiff has set out sufficient material facts in the statement of claim to support a cause of action known at law. The plaintiff states that the defendant Jawandha was the registered owner of the pickup truck and the vehicle was operated with the express or implied consent of the owner. The plaintiff also states that the collision was a result of the negligence and/or breach of statutory duty of the unidentified driver. These material facts, if proven, give rise to a cause of action under s. 86 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318.

[24] Section 86 was amended as of November 8, 2007. The amended section applies only in relation to loss or damages sustained on or after that date. Prior to November 8, 2007, s. 86(1) read:

(1) In an action to recover loss or damage sustained by a person by reason of a motor vehicle on a highway, every person driving or operating the motor vehicle who is living with and as a member of the family of the owner of the motor vehicle, and every person driving or operating the motor vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor vehicle, is deemed to be the agent or servant of that owner and employed as such, and is deemed to be driving and operating the motor vehicle in the course of his or her employment.

[25] Section 86 is described at para. 35 of *Yeung (Guardian ad litem of) v. Au*, 2006 BCCA 217, 51 B.C.L.R. (4th) 258, aff'd 2007 SCC 45:

Placed in the midst of these provisions is s. 86, which deals not with contraventions of the Act but with civil liability for damages arising out of the operation of a motor vehicle. Obviously, liability rests first with the negligent driver and it was not necessary for the statute to state that common law position. The purpose of s. 86, then, is to extend liability as well to the owner in two situations -- where the driver or operator is living with and as a member of the family of the owner, or where the driver or operator acquired possession of the vehicle with the owner's express or implied consent. Where these conditions are met, s-s. (1) deems the driver or operator to be the agent or servant of the owner, and to be driving or operating the vehicle in the course of his or her employment. Effectively, this makes the owner liable on common law principles of agency. Sub-section (2) clarifies that s-s. (1) does not relieve the driver or operator from liability,

leaving open the possibility of recovery by an injured plaintiff from both the owner and the driver.

[26] The material facts set out in relation to the unidentified driver result in various causes of action. The suggestion by the defendant Jawandha that she never loaned out her truck raises the possibility that she herself was the unidentified driver, giving rise to negligence and/or breach of statutory duty as pleaded by the plaintiff.

[27] Finally, Ms. Jawandha submits that the incident September 9, 1999, occurred on a school playing field and not on a highway, thus as s. 86(1) speaks of damages sustained by reason of the operation of a motor vehicle "on a highway", the section cannot apply to the circumstances here.

[28] I am not persuaded. The affidavit evidence filed by the plaintiff on this application includes the testimony that the incident commenced while the Dodge truck was parked in the school parking lot. Such a parking lot is included in the definition of "highway" in the Motor Vehicle Act s. 1:

"highway" includes

(c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited;

[29] The plaintiff deposes that the driver, while the truck was still in the parking lot, was standing in the bed of the vehicle. The affiant states:

He then got into the Dodge, started his engine and drove his Dodge straight at me, down a slope from the parking lot onto the field. I ran. He continued to chase me around the field in the Dodge, narrowly missing me.

[30] He goes on to allege that shortly thereafter he was struck. On this evidence, it is open to a trier of fact to conclude that the injuries sustained by the plaintiff resulted from deliberate actions of the driver which commenced on a highway.

[31] A similar issue concerns whether the plaintiff was struck by the vehicle or by the fist of a person within the vehicle. It arises as s. 19.1 of the Act stated:

If the dominant cause of any injury or death is the use of any weapon or any object, other than a motor vehicle or trailer, used as a weapon,

a) the corporation is not liable under this Act...

The question of what it was that struck the plaintiff is one which also must be determined after a consideration of the evidence at trial.

[32] I therefore conclude the action may proceed against the personal defendant Jawandha.

[33] Success being divided between the plaintiff and the defendant ICBC, each of those parties will bear its own costs. As the application by the defendant Harminder Kaur Jawandha is dismissed, the plaintiff will have the costs of this application against her.

"Williamson J."

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