
CANADA / JUDGMENT

Middelaer v. Berner

2012 BCSC 1472

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Supreme Court of British Columbia

DECIDED

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2012 BCSC 1472 Middelaer v. Berner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Middelaer v. Berner,

2012 BCSC 1472

Date: 20121004

Docket: M092249

Registry: Vancouver

Between:

Daphne Middelaer

Plaintiff

And

Carol Ann Berner

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:

J. Stanley

Counsel for Defendant:

Counsel for Municipality of Delta:

L. Robinson

Counsel for Insurance Corporation of British Columbia

R. Deering

Place and Date of Hearing:

Vancouver, B.C.

September 13, 2012

Place and Date of Judgment:

Vancouver, B.C.

October 4, 2012

- [1] The plaintiff claims damages arising from a motor vehicle accident which occurred on May 17, 2008 in Delta, B.C. (the "Accident"). This application is to add the Corporation of Delta ("Delta") as a defendant in this action and for leave to file an amended notice of civil claim which will include the allegations against Delta. This matter is contested by Delta as the application to add Delta is being brought outside the limitation period within which an action can be commenced against Delta.
- [2] The defendant has never appeared to this action and has not retained counsel.
- [3] The Third Party, The Insurance Corporation of British Columbia ("ICBC") takes no position on this application.

Factual Background

- [4] On May 17, 2008, near the 4400 block of 64th Street in Delta, B.C., the plaintiff and her four year old niece, Alexa, were standing in a grassy area adjacent to 64th Street when they were struck by a vehicle driven by the defendant. The vehicle had allegedly veered off the road onto the grassy area, striking the plaintiff and also striking and tragically killing Alexa.
- [5] This action was commenced on May 8, 2009 by the plaintiff's former counsel claiming damages arising from the Accident and naming Ms. Berner as the sole defendant.
- [6] There are several other actions commenced which relate to the Accident and they are:

- a) One action has been commenced by John and Yvette Middelaer who are the parents of the plaintiff in this action, Daphne Middelaer. At the time of the Accident, John and Yvette Middelaer were seated in a car that had been parked by the plaintiff in an area adjacent to the grassy area near 64th Street. The car in which John and Yvette Middelaer were sitting was also struck by the defendant's vehicle.
 - b) Alexa's parents, Laurel Middelaer and Michael Middelaer have commenced an action under the Family Compensation Act R.S.B.C. 1996 c.126 wherein Carol Berner, Daphne Middelaer and Delta have all been named as defendants.
 - c) Laurel and Michael Middelaer have also commenced separate actions. I am advised that Laurel and Michael Middelaer have separated since the date of the Accident. Daphne Middelaer, Carol Berner and Delta have all been named as defendants in the separate actions commenced by Laurel and Michael Middelaer.
- [7] This action, in which only Carol Berner was originally named as a defendant, was commenced by previous counsel for Daphne Middelaer and the current counsel for Daphne Middelaer in this action was retained in August of 2009, after filing a Notice of Change of Solicitor on October 21, 2009.
- [8] Current counsel for Daphne Middelaer in this action is not counsel in any of the other three actions referred to above. Separate counsel is representing Daphne Middelaer in those actions.
- [9] On February 10, 2010, ICBC filed a third party notice denying insurance coverage to the defendant Berner under the terms of a plan of automobile insurance. Later, on April 22, 2010, ICBC filed a statement of defence of the third party in which ICBC denied negligence on the part of the defendant, Berner.
- [10] The defendant Carol Berner was convicted of impaired driving causing death and several other charges arising from the Accident and in December 2010 was sentenced to two and one-half years incarceration as a result of the convictions.
- [11] On December 6, 2010, ICBC filed an application for production of the file of the Delta Police Department relating to the Accident and an order for production was granted on December 16, 2010.
- [12] Plaintiff's current counsel has deposed that on June 15, 2012 the plaintiff provided her with a copy of a report of John Morall, PhD. dated February 25, 2012. Plaintiff's counsel learned that Dr. Morral had been retained by counsel for Delta to provide an opinion with respect to the design and maintenance of that portion of 64th Street in Delta where the Accident occurred. Dr. Morral's report opined on the design, installation and maintenance standards with respect to traffic calming on 64th Street. The report is twelve pages long and included opinions regarding the speed limit in the section of 64th Street at issue, the speed humps in situ on 64th Street and whether or not they were the appropriate speed mitigation device for 64th Street. Included in the report is information on the size of the speed humps and their

spacing.

[13] On June 19, 2012 the plaintiff provided her counsel in this action with a copy of the transcript of an examination for discovery of Mr. Fraser, a representative of Delta, conducted on May 3, 2012 in the actions commenced by Laurel and Michael Middelear. From reading that transcript plaintiff's counsel learned, inter alia, of concerns raised by residents of 64th Street prior to the installation of speed humps and that Delta's policy in the installation of speed humps would have had reference to what are commonly referred to as the TAC Guidelines published by the Transportation Association of Canada, which include the maintenance and signage of roadways including guidelines for notice of the presence of speed humps. Of particular significance were statements in the transcript regarding the significance of the appropriate spacing of speed humps.

[14] On June 27, 2012, counsel for ICBC delivered to counsel for the plaintiff the report of Jonathan Lawrence which was dated June 21, 2012. Mr. Lawrence is a mechanical engineer who is an expert in the field of accident reconstruction. At page 6 of Mr. Lawrence's report he stated:

Based on my measurements of the speed humps at the accident location, they are collector street speed humps. According to the information quoted above, collector street speed humps with a 50 km/h design speed should be spaced 123 meters apart. The speed humps at the crash location were 10 meters apart.

[15] Mr. Lawrence concluded the speed humps were not in conformity with sections of the Canadian Guide to Traffic Calming; the significance of which is that in a vehicle travelling at 50 km/h, going over the humps would cause the vehicle to be more sensitive to any force applied to the steering wheel by the driver. The inevitable conclusion is that the spacing of the speed humps could have contributed to the cause of the Accident.

[16] Counsel for the plaintiff deposed that it was after her review of the Lawrence Report, the examination for discovery of Mr. Fraser, and the Morell Report that she determined that Delta was a necessary defendant to the claim of the plaintiff. This application was filed on July 26, 2012.

[17] In a second affidavit, counsel for the plaintiff stated:

3. I am advised by the Plaintiff and verily believe to be true, that in the companion actions that have been brought relating to the May 17, 2008 motor vehicle accident and in which the Plaintiff has been named a Defendant, the Corporation of Delta brought an application for summary dismissal. That application was heard on July 16 by Mr. Justice Leask and denied. . .

4. Attached to this my affidavit and marked as Exhibit "A" is a true copy of the report of Allen Swanson. I am advised by the Plaintiff and verily believe to be true that this report formed part of the materials that were relied on in resisting the application of the Corporation of Delta for summary dismissal.
 5. In his report Mr. Swanson provides his opinion as to whether the spacing of the speed humps in the location of the motor vehicle accident was in accordance with the guidelines contained in the Canadian Guide to Neighbourhood Traffic Calming. The opinion was responsive to the opinion provided by Dr. Morall. Mr. Swanson concludes that the use of the dual speed bumps on this street is not in accordance with the guidelines and that their use may have contributed to the defendant losing control of her vehicle.
- [18] There is no evidence before me that counsel for the plaintiff was aware, prior to receipt of the Morall report on June 15, 2012, followed by the reports of Mr. Lawrence and Mr. Swanson, of the issue of speed hump spacing as a possible cause of the Accident or that Delta was responsible for the design, maintenance and signage of the speed humps.
- [19] Delta argues that what is relevant is the knowledge of the plaintiff, rather than the plaintiff's lawyer, that the plaintiff had grounds to pursue a claim against Delta. Delta argues the plaintiff, being a defendant in three actions commenced as a result of the Accident, must have known that Delta was also a defendant in those actions. The presumption would be that the plaintiff in this action, Daphne Middelaer, on reading the pleadings in the other three actions, would have been aware of allegations against Delta that it was responsible for the design, construction and maintenance of the speed humps, among other duties, in connection with 64th Street. Also, Delta submits that the Morall report, a copy of the transcript of an examination for discovery of a representative of Delta, and information regarding the refusal by Mr. Justice Leask to dismiss a companion action against Delta had all been provided by the plaintiff to her counsel. Delta asserts that it can therefore be assumed that at some time previous, the plaintiff gained knowledge of a possible claim against Delta.

The Law

- [20] The plaintiff makes this application pursuant to Rule 6-2(7)(b) of the Supreme Court Civil Rules (the "Rules"), which provides:
- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
...
 - (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, ...

- [21] The limitation for the commencement of an action claiming damages was likely two years from the date the damages were sustained under s.3(2)(a) of the Limitation Act, R.S.B.C. 1996, c. 266. I say "likely" as it is possible that discoverability under s.6(4) of the Limitation Act could extend the period beyond two years. In oral submissions plaintiff's counsel conceded that it would be a "fair finding" to conclude that this application was brought outside the limitation period; however, the plaintiff contends that the date of discovery, and therefore the date on which time began to run for the purposes of the Limitation Act, was not the date of the accident, but rather from some later date. I find that the statutory limitation period has expired, however, based on my finding below, it is not necessary to delve further into the issue of discoverability.
- [22] The plaintiff relies on two decisions of the British Columbia Court of Appeal, first, *McIntosh v. Nilsson Bros. Inc.* 2005 BCCA 297 [McIntosh] and second, *Moldovan v. Republic Western Insurance Company*, 2011 BCCA 418 [Moldovan] to support the assertion that the balance of justice and convenience favours the inclusion of Delta under Rule 6-2(7)(b).
- [23] In *McIntosh*, Lambert, J.A. stated, at page 4:
- [6] The chambers judge noted that the limitation period had expired by the time when Bavaria was first added as a defendant, following the ex parte application. So he referred to and considered the guidelines in *Lui v. West Granville Manor Ltd. (No. 1)* (1985), 61 B.C.L.R. 315, *Lui v. West Granville Manor Ltd. (No. 2)* (1987), 11 B.C.L.R. (2d) 273, and *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282, where some of the factors to be considered by a judge exercising the principled discretion conferred by Rule 15(5)(a) in circumstances where a limitation period has expired were discussed. The chambers judge noted that prejudice to the defendant sought to be added could properly be presumed unless the applicant showed that, in the circumstances, the balance of justice and convenience ought to override that prejudice. In addition, the chambers judge found actual prejudice in this case in the face that Randy Marks, who was the manager for Bavaria in October of 1997, kept a record of fence inspections made at the time the inspections occurred, but that he destroyed it in the Spring of 2000. That destruction was six months after the limitation period expired. (Emphasis added.)
- [24] *Moldovan* involved an application by the plaintiff to join an insurer as a defendant outside the two year limitation provided in section 103 of Part 7 of the Insurance (Vehicle) Regulation, B.C. Regulation 447/83. The action had been commenced against the defendant owner which was insured under a policy entered into in Arizona with the insurer that did not carry on business in British Columbia. The chambers judge had ordered the addition of the insurer as a defendant and Madam Justice Newbury, who delivered the unanimous decision of the Court of Appeal, stated at page 17:

[34] Given that the insurer must have been alerted by the plaintiff's factum to this issue, and given that the Master dealt with it at length, it seems to me that it would be appropriate for us to proceed to decide whether RWIC should be added as a defendant in this action pursuant to the Rule, rather than to remit it to the Supreme Court.

[35] The circumstances surrounding the plaintiff's claim, which need not be rehearsed here, were reviewed by the Master. Most important, he found that the plaintiff's delay "resulted not from any tactical decision designed to gain an advantage for the plaintiff but from solicitor inadvertence or an honest error in judgment." As against this, RWIC has not alleged any particular prejudice.

[25] On the issue of balancing of prejudice, Newbury J. continued:

[35] A helpful summary of the law on the weighing of relative prejudice in this context is found in the analysis of Martinson, J. in *Wadsworth v. McLeod*, supra:

Regard must be had for the presence or absences of prejudice. There must be a balancing of prejudices: *Teal* at p. 299. Prejudice can be assumed, or actual.

Prejudice means prejudice associated with the delay itself. The fact that an opposing party is affected negatively by such an amendment does not mean that he is prejudiced. The prejudice must affect the ability to respond to the amended claim: *Bel Mar Developments Inc. v. North Shore Credit Union*, [2001] B.C.J. No. 512, 2001 BCSC 388 at para. 9.

I agree with the following comments of Master Bolton in *Takenaka v. Stanley*, [2000] B.C.J. No. 288, 2000 BCSC 242 at paras. 41 and 42:

Putting aside any issues of actual prejudice in addition to the prejudice resulting from the loss of the cause of action or of the limitation defence, I am satisfied that the prejudice to a plaintiff in the former event will usually be greater than the prejudice to a defendant in the latter. In the former case the plaintiff loses the opportunity to ask a court to consider a claim that the defendant has done something the law of the land considers to be actionable. In the latter, the defendant loses a windfall opportunity to avoid the issue altogether. Their respective situations may be precisely balanced in purposely financial terms, but not, I conclude, as a matter of justice. A right to seek justice cannot fairly be equated with a right to cut short the search without an answer.

I believe that his analysis provides a firmer foundation for the conclusion I reached at paragraph 68 of the *Mah* decision ([2000] B.C.J. No. 44), that if all else is equal the balance of prejudice should be resolved in favour of the plaintiff." [At paras. 22-4.]

[36] In the circumstances of this case, it seems to me that the balance of prejudice is clearly in the plaintiff's favour, and that it is just and convenient that RWIC was added as a defendant notwithstanding the time limitation in s. 103 of the Regulation. (Emphasis added).

- [26] Finally, I refer to the decision of the B.C. Court of Appeal in *Amezcuca v. Taylor*, 2010 BCCA 128 in which the court reviewed factors to be considered on an application to amend pleadings when a limitation period has expired. In that case, Justice Kirkpatrick stated:
- [36] The factors to be considered on an application to amend pleadings following the expiry of a limitation period were set out in *Teal Cedar Products (1997) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.) [Teal]. In *Letvad v. Fenwick*, 2000 BCCA 630, sub. nom. *Letvad v. Finley*, 82 B.C.L.R. (3d) 296, this Court adopted the analysis in *Teal* and applied it in the context of an application to add defendants after the expiry of a limitation period. Justice Esson, speaking for the Court, observed that there was an "unfettered discretion" to permit amendments but noted:
- [29] My understanding of the phrase "completely unfettered" in this context is that the discretion is not fettered by the relevant legislation, i.e., the Rule [24(1)] and the Limitation Act [s.4.4]. It is, however, fettered to the extent that, as was held in *Teal*, it must be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities. It was held in *Teal* that the guidelines to which the chambers judge is required to have regard include these:
- the extent of the delay;
 - the reasons for the delay;
 - any explanation put forward to account for the delay;
 - the degree of prejudice caused by delay; and
 - the extent of the connection, if any, between the existing claims and the proposed new cause of action.

McEachern C.J.B.C. in his concurring reasons said at p. 300:

- [74] Applying the same principles regardless of whether the application is to add new defendants, as in *Ricketts* or new causes of action, as in *Med Finance*, I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient.
- [27] I pause to note that plaintiff's counsel enlightened me to the fact that Delta has not relied on s.286 of the Local Government Act, R.S.B.C. 1996. c. 323 in this action, despite having plead this section in its defence to the companion actions. Without making a determination on this issue, I am of the opinion that s.286(3) would operate to prevent Delta from barring the maintenance of this action due to the plaintiff's failure to give notice within the two month period as specified in s. 286(1).

Analysis:

- [28] I am of the opinion that in this case, the balance of prejudice falls in the plaintiff's favour. To deny the application in this case would deny the plaintiff the right to assert a claim of negligence on the part of Delta which would usually be actionable and at the same time provide Delta a "windfall opportunity" of avoiding altogether adjudication as to its potential liability: *Takenaka v. Stanley*, [2000] B.C.J. No. 288, 2000 BCSC 242. Delta had been named as a defendant in the companion actions and has been actively defending those claims. There is no evidence of any prejudice to Delta involving lost or destroyed evidence, witnesses who are no longer available, or any other prejudice caused by the passage of time beyond the limitation period. The only prejudice suffered by Delta is the opportunity to rely on the statutory limitation period. There is no unfairness to Delta because it has not lost its ability to defend itself in this action. The very same actions or inactions of Delta, which form the basis of their defence to the companion actions, would be at issue in this action.
- [29] In terms of the explanation for the delay, I accept that the plaintiff's circumstance of being represented by separate counsel, and the circuitous route through which the plaintiff was required to gather documentation from parties in the other actions to forward to her solicitor in this action, contributed, through no fault of her own, to the cause of the delay. On the other hand, the issue of the delayed release of the Delta Police investigation was a matter lying solely under the control of Delta, and for which no explanation was provided.
- [30] Here, as in *Moldovan*, the delay has been caused by solicitor inadvertence or an honest error in judgment. The plaintiff's solicitor, who has had conduct of this matter since August of 2009, was supplied with the report of Dr. Morall, the transcript of the examination for discovery of a representative of Delta and the Lawrence report in June 2012, shortly before bringing this application. It is arguable that plaintiff's counsel, with further diligence, could have investigated the companion actions and learned of the possibility of pursuing Delta; however, as stated above, the prejudice which would fall to the plaintiff as a result of that failure greatly exceeds any prejudice to Delta.
- [31] Counsel for Delta submits that it is the plaintiff's knowledge, not necessarily that of the plaintiff's counsel, that is significant. Counsel says the plaintiff must have known of a possible claim against Delta having read the Statements of Claim in the companion actions and in particular the allegations against Delta relating to the design of the speed humps. In my view, if the plaintiff had prior knowledge of the claims against Delta in the companion actions, it is most likely that she did not appreciate the significance of those claims, nor did she appreciate that the action commenced on her behalf should have included Delta as a defendant. In fact, in her response to civil claim for each of the companion actions, the plaintiff, as a defendant in those actions, responded that the facts alleged against Delta were outside the knowledge of the defendant, Daphne Middelaer. From the evidence before me it would appear that as soon as the plaintiff became aware of the merits of the claim against Delta, she acted dutifully to inform her counsel. It is also clear that once the plaintiff informed her current counsel of the reports and the examination for discovery of a

representative of Delta, her counsel moved quickly to add Delta as a defendant.

Conclusion:

[32] Considering the discretion referred to in Letvad and Teal, a balancing of the prejudices to the parties and what is just and convenient, Delta ought to have been joined as a party and its participation in the proceedings is necessary to ensure the proper adjudication of the issues. As a result, I order that Delta be added as a defendant to this action. I also grant leave to the plaintiff to file a notice of civil claim to include the allegations made against Delta.

"Jenkins J."

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