

CANADA / JUDGMENT

Mills v. Martineau

2015 BCSC 658

COURT

Supreme Court of British Columbia

DECIDED

27 April 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 658 Mills v. Martineau

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mills v. Martineau,

2015 BCSC 658

Date: 20150427

Docket: M158314

Registry: New Westminster

Between:

Ryan Jonathan Mills

Plaintiff

And

Robert Joseph Martineau and Erin Iwaniuk

Defendants

Corrected Judgment: On October 7, 2015, the first page of the Reasons for Judgment was amended such that K. Norgren is only counsel for Stl'atl'imx Tribal Police Service, and not for Stuart Hoover, Off Road Auto Body and Towing, and Cst. Keith Herechuk

Before: Master Harper

Reasons for Judgment

Counsel for the plaintiff:

D.J. Brown

Counsel for the defendants:

L.J. Grenier

Counsel for Stl'atl'imx Tribal Police Service:

K. Norgren

Place and Date of Hearing:

New Westminster, B.C.

March 5, 2015

Place and Date of Judgment:

New Westminster, B.C.

April 27, 2015

I. introduction

- [1] The plaintiff was driving southbound along highway 99 near Rutherford Creek, British Columbia, on February 24, 2012 when he lost control of his vehicle and slid into a ditch. A tow truck driver and Cst. Keith Herechuk, an RCMP officer contracted to the STL'ATL'MIX Tribal Police Service (the "Tribal Police Service") attended the scene. The tow truck driver towed the plaintiff's vehicle out of the ditch and Cst. Herechuk provided traffic control. The defendant driver Iwaniuk (driving a vehicle owned by the defendant Martineau) came upon the scene. The plaintiff alleges that the Iwaniuk vehicle struck a stationary police vehicle owned by the Tribal Police Service and operated by Cst. Herechuk and then struck the plaintiff's vehicle, causing the plaintiff injury.
- [2] In their response to civil claim, the defendants allege that during the towing operation, both the tow truck and the plaintiff's vehicle blocked the south bound lane of travel on Highway 99. The defendants further say that no cones, signs or other warning devices had been placed on the roadway in advance of the towing operation to warn of the obstruction on the highway.
- [3] The defendants now apply for an order for leave to file and serve a third party notice against the tow truck driver, Stuart Hoover ("Hoover"); the towing company, Off Road Auto Body and Towing ("Off Road"); and the Tribal Police Service. Attached to these reasons as Schedule "A" is the proposed third party notice. The defendants do not seek to name Cst. Herechuk as a third party due to the operation of s. 21(2) of the Police Act, R.S.B.C. 1996, c. 367 (the "Police Act") which provides that no action for damages lies against a police officer in these circumstances. However, s. 21(4) preserves the right to claim vicarious liability for a tort committed by a police officer.

II. THIRD PARTY CLAIMS

[4] Rule 3-5(1) of the Supreme Court Civil Rules provides as follows:

(1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that

- (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
- (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
- (c) a question or issue between the party and the person

(i) is substantially the same as a question or issue that relates to or is connected with

(A) relief claimed in the action, or

(B) the subject matter of the action, and

(ii) should properly be determined in the action.

[5] A party may file a third party notice at any time with leave of the court, or without leave of the court within 42 days after being served with the notice of civil claim: Rule 3-5(4). In this case, the defendants did not file their third party notice within 42 days, hence leave of the court is required.

[6] Notice of the application must be served on the third party and all parties of record. The proposed third parties, Hoover and Off Road, have not filed a response to the application. The Tribal Police Service has filed a response and opposes the application. The plaintiff opposes the application with respect to all proposed third party claims.

III. litigation CHRONOLOGy

[7] The 42-day timeframe to file a third party notice without leave versus leave being required after that timeframe has passed makes the litigation chronology relevant.

[8] The involvement of a tow truck driver and police officer was apparent to the defendants' insurer within a few days after the accident.

[9] The plaintiff filed his notice of civil claim on January 27, 2014 and served the defendants on February 14, 2014. Accordingly, the defendants had until March 28, 2014 to file a third party notice without leave of the court.

[10] The defendants filed a response to civil claim on November 20, 2014. The trial was scheduled to commence March 25, 2015. It was adjourned by consent and a tentative new trial date of November 14 to 18, 2016 has been secured. Examinations for discovery have not yet occurred.

[11] The notice of application was filed January 15, 2015.

IV. the Position of the parties

- [12] The defendants take the position that the court should grant the order allowing them to file a third party notice because there is a claim for contribution or indemnity and it is convenient to add the third parties in this action to avoid a multiplicity of proceedings. The defendants say that they are entitled to commence a separate action against the third parties without leave and then apply to have the two actions heard at the same time. If that order is granted, the effect is the same as ordering third party notices now. Even if an order is not granted that the two actions be heard at the same time, the defendants say that they can pursue a separate action against the third parties.
- [13] The defendants further say that adding the third parties will not lengthen the trial because the tow truck driver and Cst. Herechuk will be called as witnesses in any event. They say that it is the plaintiff who will be prejudiced if the third parties are not added because the liability of the defendant driver will be reduced if fault is found against the non-parties.
- [14] The plaintiff opposes the application on the basis that it is too late and the addition of the third parties would further delay the trial and cause unnecessary complication.
- [15] The Tribal Police Service opposes the application on the basis that there is no reasonable claim for indemnity against it and there has been inordinate delay on the defendants' part in bringing the application.

V. DISCUSSION

- [16] The applicable principles were summarized in *Steveston Seafood Auction Inc. v. Bahl*, 2013 BCSC 1072 at para. 19 and I repeat them here without the case citations:
- a) The test on this application is the same as under Rule 9-5. The proposed third party must establish beyond doubt that the pleadings disclose no cause of action. The court is permitted to reject proposed claims only if the action is "bound to lose" or there is no bona fide triable issue.
 - b) In exercising its discretion as to whether leave ought to be granted, the court can consider factors such as prejudice to the parties, the expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings and the timeliness of the application.
 - c) The court is required to assume that all pleaded facts are true.
 - d) An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice.
 - e) A third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence.

- [17] In considering an application under Rule 3-5(4)(a), the court must weigh competing injustices and inconveniences: *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Ltd.*, 2013 BCSC 1741 at para. 54. Would greater injustice and inconvenience arise from allowing the third party notice or leaving the contribution claim to be pursued in a separate future action? See: *Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at para. 90.
- [18] The defendants' explanation for the delay is that counsel for the defendants did not have enough time to review the action and become aware of the involvement of the third parties, seek instructions and draft and file the third party notice. However, the rule is meant to force a defendant to give early consideration to the question of adding third parties. Here, the defendants had the information they needed within the 42-day window to decide whether to issue the third party notice.
- [19] I turn now to whether the proposed third party notice discloses a cause of action against each of the proposed third parties. Although Hoover and Off Road have not filed any response objecting to the application, the plaintiff has standing to oppose the application to add those third parties. Notwithstanding the lack of objection to the third party notice by Hoover and Off Road, I must consider whether the third party notice discloses a cause of action against them. For its part, the Tribal Police Service says that no facts are pleaded which support liability against it.
- [20] I cannot say that the claim against Hoover and Off Road is bound to fail. The claim against the Tribal Police Service is a different matter. The defendants intended to apply to issue a third party notice against Cst. Herechuk, but after considering the operation of s. 21 of the Police Act, they now propose to name only the Tribal Police Service. Section 21(2) of the Police Act provides that no action lies against a police officer in these circumstances, but s. 21(4) preserves vicarious liability for a tort committed by a police officer. It is not clear what the relationship is between Cst. Herechuk and the Tribal Police Service, but I assume the Tribal Police Service is a "prescribed entity" under s. 21(4) and therefore vicariously liable for any tort committed by Cst. Herechuk. The fact that Cst. Herechuk cannot be named as a third party does not mean that the defendants cannot claim that he committed a tort. Counsel for the Tribal Police Service rightly points out the deficiencies of the third party notice in failing to plead that the Tribal Police Service is vicariously liable for the tort committed by Cst. Herechuk. It is also not possible to discern from the proposed third party notice whether the defendants allege liability of the Tribal Police Service by reason of being the registered owner of the vehicle operated by Cst. Herechuk.
- [21] Counsel for the Tribal Police Service argues that if the third party notice would be struck out as disclosing no cause of action, the application for leave to file the third party notice should be dismissed. However, on an application to strike, the court may grant leave to amend the pleadings and I would make that order if this were an application to strike.

- [22] The Tribal Police Service makes a further argument that where the proposed third party claim can be raised by the defendant directly against the plaintiff, then no third party claim lies against any other party. It says that the defendants have raised the failure to secure the accident scene as a defence to the plaintiff's claim, therefore, the Tribal Police Service says that no third party claim can be made against it.
- [23] Counsel for the Tribal Police Service cites *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 in support of this argument. "A third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence. Where the only negligence alleged against the third party is attributable to the plaintiff, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff". This is the first branch of the rule. "On the other hand, where the pleadings and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand". This is the second branch of the rule.
- [24] The defendants argue that they fall within the second branch of the rule because the allegation made in its response to the notice of civil claim that the plaintiff failed to place cones, etc., is made in the alternative and that the claim can equally be made against Cst. Herechuk. The wording of paragraph 7 in the response to civil claim is problematic. It states:
7. No cones, signs or other warning devices had been placed on the roadway in advance of the Towing Operation to warn of the obstruction on the highway.

(Emphasis added.)

The use of the passive voice "had been placed" does not answer the question as to who failed to place the cones, signs or other warning devices. The usefulness of this type of pleading is greatly lessened by failing to link an act (or failure to act) with an actor. Paragraph 9 of the proposed third party notice repeats paragraph 7. However, the wording is improved at paragraphs 12 and 13 of the proposed third party notice except for subparagraphs 12(d) and 13(c) which make no grammatical sense. I agree with the defendants that the claim being raised as a defence to the plaintiff's claim is not a bar to the claim also being made against Cst. Herechuk.

- [25] In *Tyson*, the opposition to the application to add third parties was on the basis the application was brought too late. An adjournment of the trial would be inevitable if the application were granted. The court denied the application without prejudice to the defendant's right to re-apply if the trial was adjourned for other reasons. In the present case, the trial is not until November 2016 and, therefore, there should be no risk of an adjournment if the application is granted. The trial should not take longer than the number of days allotted with the addition of the third party claims. All parties have the responsibility to manage the litigation in a way that will ensure that the trial will be completed in the time allotted.

V. SUMMARY

- [26] The defendants had the information necessary to decide whether to file a third party notice within the 42-day window. Their explanation for the delay is weak. However, the factors in favour of making the order outweigh the factors against. The claims against the proposed third parties are not bound to fail. There is no prejudice to the plaintiff because the trial date will be preserved. Most importantly, it would be more convenient for all inter-related issues to be tried and determined at the same time rather than having the third party claims pursued in a future proceeding. Weighing all the factors, it is just and convenient to grant the defendants leave to file a third party notice.
- [27] The third party notice as presented is deficient. Therefore, I am not making an order granting leave for that version to be filed. The defendants will have to redraft the third party notice. Upon filing and serving the redrafted third party notice, if either of the named third parties determines that it is still deficient, they have the right to apply under the Rules to strike it. Also, as the litigation unfolds, the third parties may decide they have the grounds to apply to dismiss the third party claims on a summary trial basis.

VI. DISPOSITION

- [28] The application for leave to file and serve a third party notice against Hoover, Off Road and the Tribal Police Service is granted.
- [29] In my view, the defendants were in a position to issue the third party notice within the 42-day window which would have avoided this application. The plaintiff and the Tribal Police Service have been put to unnecessary trouble and expense and as a result, even though I have granted the application, there will be no order for costs.

"Master Harper"

Schedule "A"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/06/2015BCSC0658cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mills-v-martineau-2015>

Prepared on 26 October 2026 · Esheria