

CANADA / JUDGMENT

Murray v. Galuska

2002 BCSC 1532

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC1532

Citation: Murray v. Galuska et al.

Date: 20021108
2002 BCSC 1532Docket: S000671
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: IAN MURRAY
PLAINTIFFAND: JOHN GALUSKA, PAUL H.GILL,
WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF BRITISH COLUMBIA, AND
ATTORNEY GENERAL OF BRITISH COLUMBIA REPRESENTING
THE INTERESTS OF HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF BRITISH COLUMBIA
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE GEROW

(IN CHAMBERS)

Counsel for the Applicant/

Plaintiff, Ian Murray

George K. Macintosh, Q.C.

and Susan B. Horne

Counsel for the Respondents/

Defendants, Paul Gill, Attorney General of British Columbia and the Attorney General of British Columbia representing the interests of Her Majesty the Queen in right of the Province of British Columbia

Richard R. Sugden, Q.C.

Date and Place of Hearing:

October 28, 2002

Vancouver, BC

- [1] The plaintiff seeks an order that the written opinion of Richard Peck, Q.C., dated October 3, 2002 (the "Peck opinion") and any oral evidence based on that opinion be excluded from the trial of the action on the following basis:
- (a) It usurps the judge's role at trial in that it draws legal conclusions from facts assumed or inferred;
 - (b) The Peck opinion is really argument in the guise of an expert's report and is, therefore, not properly submitted as expert evidence;
 - (c) The author goes beyond what could reasonably be identified as his area of expertise and renders an opinion on matters of worker health and safety;
 - (d) The author makes conclusions of fact based on his own inferences in instances where he is in no better position than the trial judge would be to make those findings of fact;
 - (e) It is not a case where the offending paragraphs can be excised or the opinion can be written as the entire opinion is directed towards a conclusion on a point of law which is the function of the court.
- [2] The trial of the action involves a claim by the Plaintiff for damages and relief pursuant to s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter") for negligence, malicious prosecution, abuse of process, defamation and infringement of s. 7 and s. 15 Charter rights. The trial of this action is set for two weeks commencing December 2, 2002.
- [3] The action stems from charges which were laid and a trial arising out of those charges with respect to an accident that occurred on February 23, 1997 at Elk Falls Industries Ltd., a pulp and paper operation owned by Fletcher Challenge Canada Ltd. The plaintiff was the chief manufacturing officer of the paper side of the Elk Falls operation.

- [4] On February 23, 1997 an accident occurred in the chip department of the Pulp Division of the Elks Fall operation involving Mr. James Nelson. Mr. Nelson died as a result of the accident.
- [5] After the accident an investigation was undertaken into the accident pursuant to the provisions of the Workers Compensation Act, R.S.B.C. 1996, c. 492 and amendments thereto ("the Act"). Following the investigation and on the basis of information sworn by Mr. Galuska, a W.C.B. inspector, charges were laid against Elk Falls Forest Industries Ltd., being an employer, and against the plaintiff, Ian Murray, being a Director, Officer, Manager or Supervisor of Elk Falls Forest Industries Ltd., and Norman Evenson, being a supervisor of Elk Falls Forest Industries Ltd. ("the charges"). A decision was made to prosecute the plaintiff. Subsequently a trial proceeded against the plaintiff in the Provincial Court before the Honourable Judge Lazar in the Campbell River Registry of the B.C. Provincial Court.
- [6] Counsel for the defendants Paul H. Gill, Attorney General of British Columbia, and the Attorney General of British Columbia representing the interests of Her Majesty the Queen in Right of the Province of British Columbia opposes the plaintiff's application on the basis that the application is premature and the trial judge should be the one to determine whether or not the Peck opinion should be permitted. Counsel further submits the evidence is relevant in that Mr. Peck opines that a Crown Counsel of ordinary competence in 1997 would have approved the charges.
- [7] I have considered the case of *Lawrence v. Lawrence*, [1997] B.C.J. No. 1009 (S.C.), a decision of Hood J., in which he considered whether or not a party could bring on this type of application as a pre-trial motion. It was his view that although Rule 40A(13) does not seem to contemplate a pre-trial motion and that generally speaking it is preferable that a trial judge decide what evidence is to be admitted at trial, there was no reason why a motion such as the present one could not be brought on prior to trial "provided all trial evidence can be placed before the chambers judge and full submissions can be made." *Lawrence*, supra, at para. 8.
- [8] In opposing the plaintiff's application, the thrust of the defendants' arguments is based on relevance. It is the plaintiff's submission that relevance is not the issue, rather the primary objection counsel has to the opinion is that it speaks to a legal issue that is fundamental to the plaintiff's claim for malicious prosecution and that the inferences that the opinion draws from assumed facts and conclusions reached on a point of law are tasks that are solely within the purview of the trial judge. Accordingly, the plaintiff submits that this is an appropriate case for a pre-trial determination of admissibility because it will not be necessary for the court to review extensive trial evidence in order to make a determination in respect of the opinion.
- [9] The four criteria to be considered in assessing admissibility of expert opinion evidence are:
- (a) Relevance;

- (b) Necessity in assisting the trier of facts;
- (c) The absence of any exclusionary rule; and
- (d) A properly qualified expert.

R. v. Mohan, [1994] 2 S.C.R. 9.

[10] The plaintiff submits that the three criteria of primary interest are: necessity, exclusionary rules and qualifications of the expert.

[11] In Neudorf v. Netzwerk Productions Ltd., [1998] B.C.J. No. 269 (S.C.), Mr. Justice Cohen stated at para.2:

It is well settled law that expert opinion evidence is admissible only where the trier of fact is unable, due to the technical nature of the facts, to draw appropriate inferences. The general rule is that expert evidence is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge and jury.

[12] The role of the expert was also considered in R. v. Abbey, [1982] 2 S.C.R. 24. Mr. Justice Dickson (as he then was) stated at p. 42:

An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate.

[13] Counsel for the defendant argues that there is a high test on the prosecutor and there should be expert evidence before the court in order to assist the court in determining whether or not the prosecutor met the standard of care, i.e., it is necessary.

[14] Inherent in the application of the criterion of necessity is the concern that experts not be permitted to usurp the function of the court. In R. v. D.D., [2000] 2 S.C.R. 275, Major J. set out the requirements of the tests of necessity at p. 298:

The second requirement of the Mohan analysis [necessity] exists to ensure that the dangers associated with expert evidence are not lightly tolerated. Mere relevance or "helpfulness" is not enough. The evidence must also be necessary.

(emphasis in original)

[15] The exclusionary rules which have been found to apply to an expert's report are as follows:

- (a) An expert is not permitted to make findings of fact or rulings of law, rather that is the role of the trial judge.
- (b) The expert cannot make findings of law as that is also within the role of the trial judge.
- (c) Experts should not make arguments in the guise of opinions. Sengbusch v. Priest (1987), 14 B.C.L.R. (2d) 26 (S.C.); Quintette Coal Ltd. v. Bow Valley Resources Ltd. (1988), 29 B.C.L.R. (2d) 127 (S.C.).

[16] I have had the opportunity to review the Peck opinion. The Peck opinion, in my view, has numerous difficulties, including the following:

1. The author draws conclusions based on his reading of the transcript from the Provincial Court proceedings before the Honourable Judge Lazar which commenced on June 8, 1998 and continued for an additional five days on June 9, 10, 11 and July 23 and 24, 1998 ("the trial");
2. The report makes assumptions based on evidence from the trial. For example, at para. 4.11 the Report states "while this evidence does not appear to have been followed up, or adduced at trial, I assume that it could explain why Nelson acted in the way he did."
3. The author of the report reaches conclusions based on the evidence which are contrary to the conclusions reached by the trial judge;
4. The author expresses opinions which are outside of his area of expertise. For example, in paras. 5.6 and 5.7 he opines on issues of worker's safety.
5. Inferences are drawn from facts, including that Mr. Murray retained de facto control over safety issues subsequent to the corporate restructuring. It is my view it is the role of the court to make that finding.

[17] If viewed as a whole, the Peck opinion is more properly argument than opinion evidence and assesses the value of the plaintiff's claim. This is not surprising given the nature and scope of the tasks Mr. Peck was asked to address, namely:

1. Provide an opinion as to whether counsel of ordinary competence, in British Columbia in 1997, would have approved charges against Ian Murray in the circumstances of this case; and
2. Provide an opinion as to whether a Crown Counsel of ordinary competence, in British Columbia in 1998, would have continued the prosecution of Mr. Murray to verdict, given the evidence heard at trial.

[18] In my view those are the very questions that a trial judge hearing this matter will have to determine.

[19] It is useful to consider the potential relevance of the Peck opinion to the plaintiff's case. This is an action for damages and relief pursuant to s. 24(1) of the Charter for negligence, malicious prosecution, abuse of process, defamation and infringement of s. 7 and s. 15 Charter rights. The four elements which must be established by the plaintiff in the malicious prosecution case were considered in *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609 (S.C.C.) and are:

1. The defendant initiated the prosecution;
2. The prosecution resulted in the plaintiff's acquittal;

3. There was an absence of reasonable and probable cause; and
4. The defendant was motivated by malice or an improper purpose.

[20] The Peck opinion deals with the third of these requirements and in my view by so doing entirely usurps what is the judge's role at trial. The existence of reasonable and probable grounds was defined in Nelles, supra, at p. 639 as follows:

This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

[21] The Peck opinion goes through the same exercise the trial judge will be asked to undertake, that is, it reviews the evidence, draws inferences of fact and makes conclusions of law on the issue of whether or not the defendant Paul H. Gill had reasonable and probable cause to lay charges against the plaintiff and to continue to prosecute those charges.

[22] For the above reasons, it is my view that the Peck opinion is inappropriate. Accordingly, I am ruling that the written Peck opinion and any oral evidence based on that opinion be excluded from the trial of this matter.

"L.B. Gerow, J."

The Honourable Madam Justice L.B. Gerow

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