
CANADA / JUDGMENT

Ngo v. Luong

2014 BCSC 516

COURT

Supreme Court of British Columbia

DECIDED

26 March 2014

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2014 BCSC 516 Ngo v. Luong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ngo v. Luong,

2014 BCSC 516

Date: 20140326

Docket: M111666

Registry: Vancouver

Between:

Lien Anh Ngo

Plaintiff

And

Thien Luong

Defendant

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Plaintiff:

K. Gourlay

Counsel for the Defendant:

A.M. Mersey, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

March 17 and 19, 2014

Place and Date of Judgment:

Vancouver, B.C.

March 26, 2014

INTRODUCTION

- [1] Are British Columbia residents who are involved in a motor vehicle accident in Saskatchewan able to sue for damages in tort in British Columbia, or are they bound by Saskatchewan's no-fault insurance scheme?
- [2] This is an application brought by the plaintiff with consent of the defendant under Rule 9-4 of the Supreme Court Civil Rules for a decision on a point of law. The question to be decided is whether certain provisions of the Automobile Accident Insurance Act, R.S.S. 1978, c. A-35 as amended [AAIA], are properly characterized as substantive or procedural law, as that will affect whether or not the present action, brought in British Columbia, is to be determined in accordance with those Saskatchewan provisions.

RULE 9-4

- [3] Rule 9-4(2) provides:

9-4 (2) If, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off or counterclaim, the court may dismiss the action or make any order it considers will further the object of these Supreme Court Civil Rules.

FACTS

- [4] The defendant and the plaintiff, who are husband and wife, reside in Burnaby, British Columbia. On July 26, 2009, they were travelling in Saskatchewan in the defendant's motor vehicle, which was registered in British Columbia. He was driving, and she was his passenger. The defendant lost control of the vehicle, and it flipped over. The plaintiff suffered personal injuries in the accident.

THE PLEADINGS

- [5] The plaintiff filed her notice of civil claim in this action in British Columbia on March 29, 2011, seeking damages for her injuries, which she says were caused by his negligent driving. She claims general damages for pain and suffering and loss of enjoyment of life, special damages, past wage loss, future wage loss, loss of earning capacity, and future care costs.

- [6] The defendant filed a response to civil claim on August 23, 2011, and an amended response to civil claim on July 20, 2012, in which he pleaded that the plaintiff has no right of action for bodily injuries allegedly caused by the Saskatchewan accident by reason of the AAIA. Specifically, the defendant pleads and relies on ss. 40.1, 40.2 and 40.3 of the AAIA.

ISSUE

- [7] As both parties are residents of British Columbia, they agree that this Court has jurisdiction to hear the matter. The disagreement is the extent to which the law of Saskatchewan applies. They are in agreement that matters of procedure in this Court are governed by the law of British Columbia as the *lex fori* (law of the forum), but that the substantive law of Saskatchewan applies as the *lex causae* or *lex loci delicti* (law of the place where the wrong occurred).
- [8] Accordingly, the question to which the parties seek an answer is whether the AAIA is properly characterized as procedural law or as substantive law. If it is substantive, then it applies to this case, even though the suit is brought in British Columbia. If it is procedural, then it would only apply to a trial in Saskatchewan, and therefore, it would have no application to the present proceedings in British Columbia.

SASKATCHEWAN'S AAIA

- [9] In 1994, Saskatchewan adopted a comprehensive no-fault insurance scheme by way of The Automobile Insurance Amendment Act, 1994, S.S. 1994, C. 34, s. 18 (the "1994 Amendment").
- [10] Under the 1994 Amendment, there was no right to choose a tort claim in place of the no-fault scheme. Section 102 removed the right of action for all persons for "bodily injuries caused by an automobile arising out of an accident..." and replaced it with a right to certain benefits regardless of fault. That section provided:

102 Notwithstanding any other Part of this Act or any other Act or law, but subject to the other provisions of this Part:

- (a) no person has a right of action respecting, arising out of or stemming from bodily injuries caused by an automobile arising out of an accident that occurs on or after the date this Part comes into force;
- (b) no action or proceeding lies or may be instituted in any court respecting, arising out of or stemming from bodily injuries caused by an automobile arising out of an accident that occurs on or after the day this Part comes into force; and
- (c) the right to benefits stands in lieu of all rights of action to which a person is or may be entitled to respecting, arising out of or stemming from bodily injuries caused by an automobile arising out of an accident that occurs on or after the day this Part comes into force.

[11] The Saskatchewan Court of Appeal in *Cebryk v. Paragon Enterprises (1984) Ltd.*, 2010 SKCA 146 described the legislative intent of the 1994 Amendment as being the implementation of a no-fault insurance scheme:

50 The declared and otherwise obvious intention of the 1994 Amendment was to implement a no-fault insurance scheme to provide a person injured in a motor vehicle accident with immediate access to a broad range of benefits without regard to who was at fault, and thereby avoid costly court proceedings associated with proving causation or establishing the level of compensation to which the injured insured or third party is entitled. These objectives are accomplished by the payment of compensatory benefits out of the no-fault insurance fund to the injured insured and others entitled to benefits under the AAIA.

[12] The scheme encountered criticism, and in 2002 the AAIA was further amended by The Automobile Accident Insurance Amendment Act, 2002, S.S. 2002, c. 44, s. 13 (the "2002 Amendment"), which repealed s. 102 and enacted s. 40.1, which was similar to s. 102 except that it did not include clause (c). It provides:

40.1 Notwithstanding any other Act or law but subject to this Part and Part VIII :

- (a) no person has any right of action respecting, arising out of or stemming from bodily injuries caused by a motor vehicle arising out of an accident that occurs on or after the day this Part comes into force; and
- (b) no action or proceeding lies or may be commenced in any court respecting, arising out of or stemming from bodily injuries caused by a motor vehicle arising out of an accident that occurs on or after the day this Part comes into force.

[13] Unlike the 1994 Amendment, the 2002 Amendment provides an option for Saskatchewan residents to choose tort coverage. Part II relates to tort coverage, and Part VIII relates to no fault coverage. The relevant portions of ss. 40.2 and 40.3 provide:

40.2(1) A Saskatchewan resident may provide the insurer with a tort election that sets out that resident's intention to:

- (a) elect to obtain coverage pursuant to Part II;
- (b) waive the resident's right to obtain benefits pursuant to Part VIII; and
- (c) elect to bring an action for loss or damage for bodily injury caused by a motor vehicle arising out of an accident.

...

- (4) Notwithstanding section 40.1 but subject to sections 41 and 41.1 of this Act and section 44 of The Workers' Compensation Act, 1979, a tort election received by the insurer entitles the person named in it to bring an action for loss or damage respecting arising out of or stemming from bodily injury caused by a motor vehicle arising out of an accident,

(5) A tort election received by the insurer is only effective as at the date and time it is received and the tort election remains in effect until:

- (a) it is revoked; or
- (b) the person ceases to be a Saskatchewan resident.

40.3(1) A tort election must be:

- (a) in writing; and
- (b) in the form provided by the insurer.

...

(5) A tort election must be served on the insurer:

- (a) by personally delivering the tort election at any office of the insurer; or
- (b) by mailing the tort election by ordinary mail to the head office of the insurer.

(6) Notwithstanding any other law, a tort election that is sent by ordinary mail pursuant to clause (5)(b) must be received by the insurer before it is effective.

[14] The legislation does not specifically mention out-of-province drivers, but only Saskatchewan residents are given the opportunity to make a tort election. Moreover, even for Saskatchewan residents, a tort election is only effective if it is made before there has been an accident, and only if the claimant has not ceased to be a Saskatchewan resident.

[15] Section 101 provides that (subject to the transition provisions in ss. 218-218.2) Part VIII dealing with no-fault benefits applies to anyone injured in a motor vehicle accident who has not provided the insurer with a tort election:

101(1) Notwithstanding any other provision of this Part or any other Act or law but subject to sections 218 and 218.1, this Part applies only to accidents that occur on or after the date that this Part comes into force.

(1.1) This Part applies to any person who sustained bodily injury caused by a motor vehicle arising out of an accident on or after the date that this Part comes into force and who has not provided the insurer with a tort election in the manner prescribed by Part IV.

(1.2) A person who is entitled to benefits pursuant to this Part is not entitled to benefits pursuant to Part II other than a death benefit pursuant to Part II relating to the death of an insured.

[16] A tort election was not made by the plaintiff in this case, nor would it have been available to her as a non-resident.

THE DISTINCTION BETWEEN SUBSTANTIVE AND PROCEDURAL LAW

[17] The distinction between substantive and procedural law was described in this way in Castel & Walker, *Introduction to Conflict of Laws*, 6th Ed. (Toronto: Butterworth's, 2005) at p 6-1:

"Procedure" has been described as the "mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer, the machinery as distinguished from the product." In other words, procedure pertains to the methods of presenting to a court the operative facts upon which legal relations depend. It is primarily concerned with the machinery for enforcing a right by action in the courts and it has been held to include, inter alia, the form of the action, the parties to the action, the determination of the proper court, the rules of practice and pleadings, questions of evidence and the execution of foreign or domestic judgments.

[18] The leading authority in Canada on the distinction between substantive and procedural law is *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022. Tolofson was a British Columbia resident injured in a Saskatchewan motor vehicle accident. The suit was brought in British Columbia, and an issue arose of whose limitation period applied. The Supreme Court of Canada held that as the accident occurred in Saskatchewan, Saskatchewan's substantive law applied, and that included its limitation period, which the Court found to be substantive, not procedural. As Saskatchewan's (shorter) limitation period had expired, Tolofson's action was barred, even though the case was brought in a British Columbia court.

[19] The Court explained the method by which laws may be characterized as substantive or procedural:

76 In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial for, as Cheshire and North, *Cheshire and North's Private International Law* (12th ed. 1992), at pp. 74-75, state:

One of the eternal truths of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum.

77 The reason for the distinction is that the forum court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to "administer [its] machinery as distinguished from its product" (*Poyser v. Minors* (1881), 7 Q.B.D. 329, at p. 333, per Lush L.J.). Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward. The legal realist Walter Cook has commented (*The Logical and Legal Bases of the Conflict of Laws* (1942), at p. 166):

If we admit that the 'substantive' shades off by imperceptible degrees into the 'procedural', and that the 'line' between them does not 'exist', to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?

78 This pragmatic approach is illustrated by *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.). In that case the issue was whether the requirement of s. 37 of the Real Estate Act, R.S.B.C. 1979, c. 356, that a real estate agent be licensed in British Columbia, should be categorized as procedural or substantive. The parties had executed a real estate listing agreement in Alberta for land situated in British Columbia. The plaintiff, an agent licensed in Alberta, sold the land to Alberta residents. The defendant vendor failed or refused to pay the commission. The plaintiff sued in British Columbia. The *lex causae* was Alberta. The defendant pleaded that the British Columbia licensing requirement was procedural. The court, however, ruled that it was substantive, notwithstanding that the section read: "A person shall not maintain an action . . .", language traditionally relied on for a finding that a statute is procedural because it purported to extinguish the remedy, but not the right. The court expressly relied on policy reasons for its decision. It stated at pp. 327-28:

If, however, the contract is governed by the law of Alberta and if the contract is valid under the law of Alberta, the characterization of s. 37 as procedural would deprive the plaintiff of the opportunity to enforce his legal rights in a British Columbia Court. The only purpose of s. 37 is to enforce the licensing sections, and it should be examined in this context. I think that legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive.

79 This approach makes sense to me. It is right to say, however, that it is significantly different from the early common law position as it relates to statutes of limitation.

[20] The plaintiff in the present case concedes that the AAIA as it existed following the 1994 Amendment, but prior to the 2002 Amendment, was substantive law, so that a British Columbia resident who was involved in a motor vehicle accident in Saskatchewan was bound by the Saskatchewan no-fault provisions.

[21] According to the plaintiff, however, that changed with the 2002 Amendment, and the AAIA must now be categorized as procedural, with the effect that it does not apply to persons who, like the plaintiff, bring their case in a British Columbia court.

[22] Counsel for the plaintiff articulated the argument in this way at para. 14 of the written submissions:

14. However, in 2002 the AAIA was amended. It now allows Saskatchewan residents to choose either tort coverage or no-fault coverage. The 2002 amendments changed the nature of the law, transforming it from a substantive law that eliminated a cause of action into a procedural law that governs how certain rights are enforced following a motor vehicle

accident. It is no longer a law that dictates the rights of civilians. Rather, it is one that allows individuals to choose between two procedures for pursuing their rights when injured in an accident.

[23] In support of that conclusion, the plaintiff advances this principle at para. 21:

21. Where a legal system allows residents to choose between different options, that scheme must be considered procedural law. Simply put, substantive law must apply equally to all citizens. The ability for individual citizens to decide whether a given law will apply to them is a strong indicator that the law is procedural. [*Italics in original.*]

[24] Counsel for the plaintiff was not able to refer me to any case authority to support the principle expressed in the paragraph above, and it does not appear to me to be a sound principle.

[25] In my view, the AAIA was substantive law before the 2002 Amendment, and it remains substantive law after the 2002 Amendment. The fact that Saskatchewan residents are now given an option to make a tort election prior to the occurrence of a motor vehicle accident does not change the proper characterization of the law.

[26] Both before and after the 2002 Amendment, the AAIA defines the rights of persons injured in motor vehicle accidents in Saskatchewan. It is not concerned merely with the procedure or mechanism for enforcing those rights.

[27] The substantive rights of a person who is injured in a motor vehicle accident in Saskatchewan after 2002 and who did not make a tort election prior to the accident are those rights set out in Part VIII. That is true for anyone who did not make a prior tort election, regardless of whether that person is a Saskatchewan resident or not. The only difference is that the out-of-province claimant never had the possibility of making such an election. But once the accident has occurred and the claimant, whether from Saskatchewan or not, has not previously made a tort election, the claimant's rights are those defined by Part VIII of the AAIA. Thus, the statute does not, as submitted by the plaintiff, set out a procedural election by which a claimant who has been injured in an accident can then select the means by which he or she enforces his or her rights. The rights are already defined by the statute at the moment the accident has occurred. Since the AAIA defines what the claimant's rights are and not the means of their enforcement, the AAIA is substantive, not procedural law.

[28] This categorization of the AAIA has the consequence that a British Columbia plaintiff who is injured in a Saskatchewan motor vehicle accident is in no better position bringing his or her suit in British Columbia than in Saskatchewan. The fact that this categorization eliminates a motive for forum shopping is an additional indicator that the categorization of the law as substantive is the correct categorization.

CONCLUSION

[29] The order sought by the plaintiff on this motion under Rule 9-4 was:

A declaration that this action is not barred by the provisions of the Automobile Accident Insurance Act, R.S.S. 1978, c. A-35, as pleaded at paragraphs 6 - 8 of the Defendant's Response to Civil Claim.

[30] As I have found the AAIA to be substantive, rather than procedural law, and as the AAIA is therefore applicable to the plaintiff's claim regardless of the fact that it is brought in a British Columbia court, the plaintiff's request for a declaration that this action is not barred by the provisions of the AAIA is dismissed.

The Honourable Mr. Justice W.F. Ehrcke

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