

CANADA / JUDGMENT

Panchal v. Wal-Mart Canada Corp.

2022 BCSC 71

COURT

Supreme Court of British Columbia

DECIDED

17 January 2022

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2022 BCSC 71 Panchal v. Wal-Mart Canada Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Panchal v. Wal-Mart Canada Corp.,

2022 BCSC 71

Date: 20220117

Docket: S197047

Registry: Vancouver

Between:

Asmita Panchal

Plaintiff

And

Wal-Mart Canada Corp./La Compagnie Wal-Mart du Canada and

John Doe

Defendants

Corrected Judgment: The cover page of the Reasons for Judgment has been corrected on January 19, 2022

Before: Master Harper

Reasons for Judgment

Counsel for the Plaintiff, appearing via telephone conference:

N. Muirhead

J. Gray, Articled Student

Counsel for the Defendant, Wal-Mart Canada Corp./La Compagnie Wal-Mart du Canada, appearing via telephone conference:

E. Harris

Place and Date of Hearing:

Vancouver, B.C.

December 15, 2021

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2022

Introduction

- [1] The plaintiff and the defendant, Wal-Mart Canada Corp. ("Wal-Mart"), bring cross-applications that raise issues about the proper way to advance claims arising from allegations of spoliation of evidence.
- [2] Spoliation occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once spoliation is demonstrated, a rebuttable presumption arises that the evidence would have been unfavourable to the party destroying it: *McDougall v. Black & Decker Canada Inc.* 2008 ABCA 353, para. 18.
- [3] Spoliation is not an independent tort. The destruction of evidence in the appropriate case carries a procedural as opposed to a substantive remedy. The plaintiff is entitled to a flexible remedy to compensate the plaintiff for any loss suffered by reason of the destruction of evidence. The question of what remedy for spoliation is appropriate is best left to the discretion of the trial judge, but the remedies can include an adverse inference against the spoliator, punitive damages, or special costs: *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C.C.A.), paras. 9, 23, 25, 32, and 33.

Background

- [4] The plaintiff alleges that she was injured at a Wal-Mart grocery store when she slipped and fell as a result of cherries dropped on the floor by the defendant, John Doe.
- [5] There is CCTV footage of the incident, but the plaintiff says that Wal-Mart deliberately destroyed other probative video evidence despite a pre-litigation agreement to preserve the evidence.

- [6] The plaintiff seeks leave to amend her notice of civil claim ("NOCC"). The proposed amended notice of civil claim ("ANOCC") is attached as Schedule A to these reasons. The amendments include the facts of the alleged spoliation, allegations that Wal-Mart implemented policies intended to limit its liability to customers injured at its stores, and that Wal-Mart destroyed CCTV evidence. The plaintiff claims aggravated and punitive damages, and special costs.
- [7] The plaintiff filed a reply to the response to civil claim ("ROCC"), claiming various forms of relief arising from the spoliation. Wal-Mart applies to strike the reply. The reply is attached as Schedule B to these reasons. The reply was filed on November 5, 2021, well outside the time limited for filing a reply.
- [8] As the cross-applications address the adequacy of pleadings, and not the merits of the claims, the facts alleged by the plaintiff in the proposed ANOCC and the reply are assumed to be true.

Discussion

- [9] Wal-Mart's position on both applications, relying on *Endean*, is that because spoliation is an evidentiary issue, and not an independent cause of action, spoliation should not be pleaded.
- [10] The plaintiff concedes that spoliation is not a cause of action, but says that on the basic principles of pleadings, the facts and the legal basis of the spoliation claim ought to be pleaded so that proper notice is given to Wal-Mart and to the court.
- [11] In *Endean*, the plaintiff asserted a cause of action based on spoliation. Because spoliation is not an independent tort, the claim was struck as disclosing no reasonable cause of action.
- [12] *Endean* does not operate to bar the plaintiff's applications to amend her NOCC. While *Endean* involved a claim based solely on spoliation, in the present case, if the claim of spoliation is framed as an evidentiary claim, ancillary to the tort claim (the slip and fall), it does not stand alone as an independent cause of action. As will be seen below, the evidentiary claims can stand and claims purporting to raise an independent cause of action can be struck.

The Proposed ANOCC

- [13] The application is made pursuant to Rule 6-1(1)(b)(i) of the Supreme Court Civil Rules:

When pleadings may be amended

- (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party, other than to change parties or withdraw an admission,
- (a) once without leave of the court, at any time before service of the notice of trial, or
- (b) after the notice of trial is served, only with
- (i) leave of the court, or

- [14] The general rule is that amendments should be granted liberally, so as to enable the real issues to be determined. The overarching principle of the just, speedy, and inexpensive determination of every proceeding on its merits applies to this application. However, the proposed pleading must disclose a cause of action.
- [15] Wal-Mart argues that if the plaintiff is purporting to plead a new cause of action, the pleading is barred by the limitation period. It is common ground that a claim of spoliation is not a separate tort and therefore the limitation period issue is not relevant for the purposes of the application.
- [16] A notice of civil claim must set out the material facts: Rule 3-1(2). Here, the material facts that give rise to a claim for aggravated and punitive damages, and special costs, are the facts of the spoliation. If the trial judge finds spoliation, the remedies are within the discretion of the trial judge, but may include an adverse inference against the spoliator, punitive damages or special costs: Lederman, Bryant & Fuerst, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) at paras. 18.155-18.157.
- [17] Because the range of remedies available are within the discretion of the trial judge, it is necessary for procedural fairness for Wal-Mart to know in advance the spoliation claims the plaintiff is making and the remedies she seeks arising from those claims. A notice of civil claim is intended to give the opposing party notice of the case it has to meet. If the facts of the spoliation were not pleaded, then the defendant and the trial judge would be taken by surprise. Wal-Mart says that the plaintiff should set out any allegations of spoliation and claims for procedural remedies arising from the spoliation in a letter from her counsel to counsel for Wal-Mart. Presumably, Wal-Mart's counsel would then respond by letter to the allegations.
- [18] There is no rule of court that a plaintiff must write a letter to opposing counsel setting out the factual and legal basis for claims that could otherwise be contained in a NOCC. Advancing and defending claims by a letter-writing campaign is not an effective or practical way to conduct litigation.
- [19] Further, the scope of discovery of documents and examinations for discovery is framed by the pleadings. Wal-Mart concedes that its document disclosure obligations include documents relevant to the spoliation claim, and that its representative may be examined on the spoliation claims at their examination for discovery.
- [20] If there is a chambers application on the scope of document disclosure or the scope of the examinations for discovery, the presider should be directed first to the pleadings as pleadings form the foundation for such applications. In submissions, counsel for Wal-Mart conceded that discovery of documents should include documents relating to the spoliation issue, and that Wal-Mart's representative is examinable on the spoliation claims, because plaintiff's counsel wrote to defence counsel raising the spoliation issue. In my view, the scope of document discovery and examinations for discovery should be based on pleadings and not on counsel's letters.

- [21] If Wal-Mart's position is correct, a defendant would not know that there is a claim of spoliation from the NOCC and would be able to resist listing material documents, and resist its representative answering questions on spoliation at their examination for discovery. It would be inefficient for the parties or the court, in the event of a chambers application, to have to resort to counsel's letters in order to determine the proper scope of oral or documentary disclosure.
- [22] To follow Wal-Mart's argument to its logical conclusion, if I refuse leave to the plaintiff to amend her NOCC, her counsel would be free to write a letter to defence counsel enclosing the proposed ANOCC. Wal-Mart would have no recourse before trial because there is no provision in the Supreme Court Civil Rules for an application to "strike" a claim made in a letter. Therefore, the plaintiff would be free to make whatever claims she wished outside the NOCC and leave it to the trial judge to determine whether the claims were permissible or not.
- [23] Although counsel for the plaintiff was unable to find any case authority in British Columbia in support of the argument that procedural remedies based on spoliation may be pleaded, on the other hand, counsel for Wal-Mart was unable to find any British Columbia case authority that says that spoliation (as long as it is not framed as an independent tort) may not be pleaded.
- [24] An Ontario case, *Ben-Margi v. Paiva*, 2021 ONSC 6975, stands for the proposition that since spoliation is treated as a rule of evidence, it does not need to be specifically pleaded, but a party is not precluded from pleading spoliation.
- [25] The plaintiff does not suggest that *Ben-Margi* is binding on this court. *Ben-Margi* is an Ontario case and Ontario's rules governing pleadings may not be the same as those in British Columbia. However, the plaintiff says that the reasoning is persuasive. I agree that there is no policy reason why spoliation should not be pleaded. There is a way to plead spoliation that makes it clear that the claim is an evidentiary claim and not a separate tort.
- [26] In my view, it is preferable for claims arising from spoliation, and the facts on which such claims are made, to be set out in the notice of civil claim as long as the pleading does not purport to elevate a claim of spoliation to an independent tort.
- [27] I now turn to the question of whether the proposed ANOCC contains claims arising to an independent tort. If so, those claims are improper and should be struck.
- [28] The allegation that Wal-Mart implemented policies intended to limit its liability and the consequential allegation of "misconduct" are claims that purport to plead an independent tort. They do not directly relate to the claim that Wal-Mart destroyed evidence in this particular case. These allegations are set out in the Statement of Facts at paragraphs 4.1, 4.2, 15.9, 15.10, and 15.11 and must be removed.

[29] I express no opinion as to whether Wal-Mart's policies are relevant for the purposes of oral and documentary disclosure on the specific claim of spoliation that pertains to this case.

[30] The proposed ANOCC at para. 15.8 states:

Wal-Mart's conduct in breaching its agreement with the plaintiff to preserve the Video Footage, and in destroying a portion of the Video Footage, was an independent, actionable wrong and is highhanded and malicious conduct that is deserving of rebuke by the court in the form of punitive damages.

[31] This paragraph purports to claim spoliation as an "independent, actionable wrong". Spoliation is not an independent tort and therefore the words "was an independent, actionable wrong" must be removed. The remainder of the paragraph is acceptable because it preserves the evidentiary basis of the claim of spoliation and links the evidentiary claim to the remedy of punitive damages.

[32] The remaining proposed amendments properly raise the issue of spoliation and the relief sought as a consequence. The amendments put Wal-Mart on notice of the spoliation claims and avoid the prejudice Wal-Mart could suffer if the issue of spoliation were raised at trial without notice. Notice provided informally by counsel's correspondence is not a reasonable substitute for pleadings. Finally, there is no prejudice to Wal-Mart if the amendments are allowed as Wal-Mart is permitted under Rule 6-1(5) to file a response to the ANOCC with respect to any matter raised by the amendments. Accordingly, I grant the plaintiff's application to amend the NOCC with the exceptions as noted.

The Reply

[33] The reply was filed before the application for leave to file an ANOCC. The reply is, of course, a reply to the existing ROCC. As a result, the pleadings are now out of chronological order. As I have granted leave to file an ANOCC, Wal-Mart may now file a response to that pleading. Counsel did not make any submissions as to whether the plaintiff would then be entitled to file a reply in accordance with Rule 3-6 or whether leave is required. To avoid debate on this point, and without deciding that leave is required, I grant leave to the plaintiff to file a new reply within seven days after service of Wal-Mart's response to the ANOCC.

[34] Wal-Mart argues that the reply should be struck because it was filed out of time. This is now a moot point because Wal-Mart will now be filing an amended ROCC to the ANOCC and the time for filing the reply will be seven days after Wal-Mart serves its amended ROCC.

[35] Because the reply is now obsolete, the application to strike the reply is moot. It remains to be seen what any new reply will look like. However, for the benefit of the parties, I will offer some comments about the existing reply in the hope that the parties may avoid further applications. My comments are not intended to bind a future presider if the issue of the propriety of the new reply is the subject of a future application.

- [36] The reply resembles the proposed ANOCC, but has some distinct differences. The facts set out in the reply mirror the facts set out in the ANOCC and all address the spoliation issue and allegations that Wal-Mart had a policy of destruction of such evidence that might harm its defence following similar accidents. Further, the plaintiff alleges that, as a consequence of the destruction of evidence, the plaintiff will be unable to identify John Doe. The plaintiff seeks orders that:
- a) Wal-Mart may not dispute its liability in the action;
 - b) in the alternative, Wal-Mart must compensate the plaintiff for any loss arising from the inability of the plaintiff to identify John Doe;
 - c) further, or in the alternative, an inference that the destroyed Video Footage, if it were available at trial, would be harmful to Wal-Mart;
 - d) Wal-Mart may not introduce evidence regarding its inspection or cleaning of the area in which the plaintiff was injured during the period for which Wal-Mart destroyed the Video Footage; and
 - e) such other remedy the court deems just.
- [37] The proper function of a reply is to confront the existing ROCC. The reply should not repeat, amend, or clarify allegations contained in the NOCC. A reply must meet the standards for all pleadings, and is objectionable if it contains a mixture of material facts, argument and evidence: *McLachlin & Taylor, British Columbia Practice*, 3rd ed. (LexisNexus, 2006).
- [38] A reply is only permitted if the plaintiff wishes to set up an affirmative answer to the existing ROCC. A reply that is a simple joinder of issue must not be filed or served: Rule 3-6(4). In this case, the plaintiff wishes to assert that Wal-Mart's defences are untenable because of spoliation. If the plaintiff does not serve a reply, a joinder of issue on the existing ROCC is implied: Rule 3-6(3).
- [39] The question is whether the reply is a proper form of reply. If the reply attempts to raise new causes of action, or to amend or clarify the NOCC, the reply is improper and should be struck: *Certus Strategies (British Columbia) Corporation et al. v. Insurance Corporation of British Columbia*, 2005 BCSC 608.
- [40] Although Rule 3-6 does not set out what is to be included in a reply, Rule 3-7(12) addresses what is to be included in a pleading after a notice of civil claim.
- [41] Rule 3-7(12) provides the following:
- Pleading after the notice of civil claim
- (12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that
 - (a) the party alleges makes a claim or defence of the opposite party not maintainable,

- (b) if not specifically pleaded, might take the other party by surprise, or
 - (c) raises issues of fact not arising out of the preceding pleading.
- [42] The plaintiff says that she is required to file a reply. She alleges in the reply that the Wal-Mart's defence is not maintainable because of the spoliation of evidence. Further, if the plaintiff did not make the spoliation claims in the reply, Wal-Mart might be taken by surprise.
- [43] There are no new "issues of fact" (Rule 3-7(12)(c)) that are not included in the ANOCC (as revised in accordance with my reasons above) and, therefore, this factor does not apply to the analysis of whether the reply is proper. However, for the same reasons as I gave on the application for leave to file an ANOCC, the reply should not contain any claims relating to Wal-Mart's policies.
- [44] As noted, the destruction of documents in the appropriate case carries a procedural as opposed to a substantive remedy. To the extent that the reply seeks a remedy that forecloses Wal-Mart's defence, rather than advance a monetary claim, it is responsive to the existing ROCC and, therefore, not improper. However, where the reply sets up a claim for damages, it is improper because a reply is not the place to seek damages.
- [45] The relief sought that Wal-Mart compensate the plaintiff for any loss arising from the inability of the plaintiff to identify John Doe is a claim for relief arising from a separate cause of action, i.e., that the spoliation caused the plaintiff some sort of injury, and is not permissible since spoliation is not a separate tort. Not only is this claim for relief not permitted in a reply, it would not be permitted in a NOCC.
- [46] Even though the current reply is obsolete because it will be overtaken by a new reply, it contains impermissible pleadings and therefore should be struck.

Disposition

- [47] The application for leave to file an ANOCC is granted in accordance with my reasons as to the revisions that are required.
- [48] The reply is struck.
- [49] The plaintiff is granted leave to file a new reply if Wal-Mart files an AROCC.

Costs

- [50] There has been divided success on these applications. Costs will be in the cause.

"Master Harper"

Schedule "A"

Schedule "B"

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