
CANADA / JUDGMENT

Persall v. Buxton

2012 BCSC 347

COURT

Supreme Court of British Columbia

DECIDED

9 March 2012

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2012 BCSC 347 Persall v. Buxton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Persall v. Buxton,

2012 BCSC 347

Date: 20120309

Docket: S102876

Registry: Vancouver

Between:

Wayne Francis Persall

Plaintiff

And

Peter Buxton

Defendant

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Morishita

Counsel for the Defendant:

J.G. Bye

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 22, 2011

Place and Date of Judgment:

Vancouver, B.C.

March 9, 2012

- [1] The defendant applies pursuant to Rule 12-6 to strike the plaintiff's jury notice. The principal basis for the application is the issues are said to be more intricate or complex than is appropriate for a jury trial.
- [2] The plaintiff alleges he was injured in an accident in September 2006 in the City of Surrey ("Surrey") when the vehicle he was driving was struck by another vehicle in an intersection. Shortly thereafter the defendant in this action, who at the material time was a lawyer practising in Surrey, began to advise the plaintiff in regard to a potential action to recover damages for his injuries. The plaintiff alleges the defendant, in breach of his duty, failed to investigate adequately the circumstances of the accident; failed to advise the plaintiff of the potential liability of Surrey for the alleged faulty design, construction and/or maintenance of the intersection at which the accident occurred, and failed to provide notice of the damage claim to Surrey within two months of the date of the accident as required by the Local Government Act, R.S.B.C. 1996, c. 323 [Act].
- [3] The defendant ceased to represent the plaintiff in March 2007 when other legal representation was provided to the plaintiff for about a year. In early 2008 the plaintiff instructed Michael Slater, Q.C., to act for him in a claim for damages against the other driver, Ms. Bond, and Surrey.
- [4] In March 2008, Mr. Slater delivered notice of the damage claim to Surrey. In July 2008, Mr. Slater commenced action no. M083034, Persall v. Bond and City of Surrey (the "Personal Injury Action"). Surrey successfully applied to strike out the claim against it arguing that the plaintiff had failed to give timely notice as required by s. 286 of the Act. In early 2010, the plaintiff settled his damage claim with Ms. Bond and in April the plaintiff sued Mr. Buxton in this action alleging his breach of duty.
- [5] I heard submissions initially on September 22, 2011, on the question of whether the jury notice should be struck out. At that time I did not have the amended statement of defence of the defendant Bond in the personal injury action. On reviewing that pleading I noted that defendant had alleged the negligence of the plaintiff and I then sent a memorandum to counsel on this application inviting them to make submissions on the implications for the application to strike the jury notice of that contributory negligence allegation and in

particular any implications arising from paragraph 10 of the statement of claim in the solicitor's negligence action which reads as follows:

The plaintiff claims that as a result of the defendant's negligence and breach of the Retainer, the plaintiff has suffered loss and damage including the opportunity to recover his full damages from the City of Surrey for its tortious conduct, or, in the alternative, to recover some of his damages from the City of Surrey by way of either settlement or judgment.

- [6] Counsel provided helpful written outlines of argument following my memorandum and on March 6, 2012, I heard brief oral submissions.
- [7] In deciding this application I am invited by the defendant to find the complexities of a trial within a trial as required in this particular solicitor's negligence action ought to persuade me to strike the jury notice.
- [8] In *Han v. Cho*, 2008 BCSC 1192, Griffin J., under the heading "General Principles Regarding the Right to a Jury" observed the following at paras. 12-15:
- [12] There is a common law right to a jury. A party ought not to be deprived of this important right except for cogent reasons: *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528 at 533.
- [13] In *Nichols v. Gray* (1978), 9 B.C.L.R. 5 (C.A.), Craig J.A. explained the plaintiff's entitlement to a jury in civil cases (at 10):

A plaintiff is entitled to trial by jury, except in certain types of cases specified in the Rules, and he can be deprived of this right only if a party opposing a trial by jury establishes "clearly" that one of more of the exceptions in R. 39(20) [the predecessor to Rule 39(27)] is applicable. *McDonald v. Inland Natural Gas Co.* (1966), 57 W.W.R. 87 at 95.

- [14] In *McDonald v. Inland Natural Gas Co.* (1966), 57 W.W.R. 87 (B.C.C.A.), Branca J.A. commented at 95 that "while the right of a trial by jury goes back far and is imbedded deeply in the history of our law, and while a litigant is not to be deprived of that right unless he is clearly within an exception created by law, where such an exception applies, that right should be refused."
- [15] The onus is on the applicant seeking to set aside a jury notice to show that the party who selected trial by jury is not entitled to that mode of trial: *Creasy v. Sweny* (1942), 57 B.C.R. 457, [1942] 3 W.W.R. 457 (C.A.).
- [9] Counsel for the plaintiff draws my attention to the reasons of Madam Justice Bruce in *Cliff v. Dahl*, 2012 BCSC 276. Bruce J. declined to strike out a jury notice in two complex personal injury actions to be heard at the same time. I accept that a jury is capable of hearing and deciding such actions but the added complexities in the case before me of a trial within a trial, and the implications of the plaintiff's potential contributory negligence in the personal injury action and the approach the counsel would take to negotiating a settlement, the possibility of which is alluded to in paragraph 10 of the statement of claim, lead me to the conclusion that *Cliff v. Dahl* has several points of distinction from the application before me

and does not assist in my decision.

- [10] There are inherent complexities in a solicitor's negligence action. In *Nichols v. Warner*, Scarborough, Herman & Harvey, 2009 BCCA 277, the Court of Appeal commented on them as follows:
- [26] In a case of this kind, the court is required to essentially conduct a trial within a trial to the extent possible: the first to determine whether the solicitor has been negligent in respect of the litigation undertaken; the second to determine, if so, what loss the solicitor's negligence has caused the client. In some instances, whether there has been a loss and what it was can be readily established. In others, however, the prospect of success and recovery may not be easily shown due to uncertainties of proof and perhaps legal consequences inherent in any given case. Indeed, the mere passage of time may render the conduct of a trial within a trial virtually impossible. What the court must do in such circumstances where the prospect of recovery in the original action is inconclusive is to quantify as best it can the value of what the authorities regard a lost opportunity. The Alberta Court of Appeal summarized the approach to be taken in *Fisher v. Knibbe*, [1992] 5 W.W.R. 385 at para. 12, 3 Alta. L.R. (3d) 97:

After conducting the "trial within a trial" to determine what damages, if any, a negligent solicitor is liable for missing a limitation period, three results are possible. First, the trial judge could find that had the case gone to trial the plaintiff would have been successful and in such case 100 per cent of the lost damages would be awarded against the solicitor. Second, the trial judge could find that the plaintiff would not have been successful therefore only nominal damages may be awarded against the solicitor. Finally, where time has passed to such an extent that a "trial within a trial" would be impossible, then the court must to the best of its ability calculate the value of the opportunity lost to the plaintiff and award damages against the solicitor on that basis.

- [27] At least in this jurisdiction, the threshold for recovery of a lost opportunity appears to be one of a "reasonable possibility" that something was in fact lost. That was the term used in *Papageorgiou v. Seyl* (1990), 45 B.C.L.R. (2d) 319 (C.A.) at 326. In *Trinden Enterprises Ltd. v. Ramsay*, 2009 BCCA 125 at para. 22, *Graybriar Industries Ltd. v. Davis & Co.* (1990), 46 B.C.L.R. (2d) 164 (S.C.), *aff'd* (1992), 72 B.C.L.R. (2d) 190 (C.A.), was cited. There, on a consideration of the authorities, it was said (at 193) the client is entitled to an award if the claim said to have been lost is "not merely 'fanciful'" but is established as a possibility. Once the threshold is met, it remains for the court to assess the strength of the possibility, having regard for the exigencies of the litigation.
- [11] A jury should be assumed to be capable of trying the plaintiff's personal injury action if it had gone to trial. However, the defendant argues the extra complexity arising from the need to determine whether the defendant Mr. Buxton breached a duty to the plaintiff, which breach deprived the plaintiff of the ability to join Surrey as a defendant, and which now mean a jury would need to assess damages for that lost opportunity, ought to tip the balance against trying the solicitor's negligence action with a jury.

- [12] I do not accept that a jury in this case would find its task overly complex if it was asked to decide if the failure to give notice to Surrey of the potential damage claim should be characterized as a breach of duty by the defendant's solicitor. Nevertheless, there are other difficulties with a jury trial which lead me to conclude a trial by a judge alone is more suitable in this case.
- [13] In *Lopushinsky v. Spraggs*, 2000 BCSC 222, Sigurdson J. considered the suitability of a jury trial in a complex case as follows at para. 19:
- [19] The principles pertinent to this application, I think, have been conveniently marshalled and aptly stated by Cohen J. in *Yewdale v. Insurance Corporation of British Columbia* (1994), 1 B.C.L.R. (3d) 278 at 285 (S.C.), where he discussed the possibility that a case that requires organized and deliberate consideration of complex issues might not be suitable for trial by a jury:

I think that the disposition of this application falls squarely within the words of McEachern C.J.S.C. (as he then was) in two decisions. First, in *Dunne v. Kokan* (Unreported), September 8, 1982, Vancouver Registry Nos. C801301, C801387, a case involving medical malpractice allegations against multiple defendants, the Chief Justice said at p. 4:

In view of the foregoing I have a discretion to order that the trial be heard by a Judge without a jury, and I so order because, in my respectful view, all parties have a better chance of a satisfactory trial by Judge alone, notwithstanding the presumed superior "wisdom" of a jury. Wisdom is not the question. It is rather a question of managing facts and issues for which a trial by Judge alone is more suitable in a case such as this.

Secondly, in *Macdonald v. Smith* (1983), 48 B.C.L.R. 285 (S.C.), where the issues involved occupiers' liability on the part of two sets of defendants, negligence against four sets of defendants, breach of statutory duty against two sets of defendants, possible contributory negligence and assessment of damages, the Chief Justice said at p. 288:

Briefly, I think a case of this complexity cannot conveniently or suitably be tried and a proper conclusion assured to the parties when there is no opportunity for thoughtful and timely consideration and reconsideration, particularly after several days of evidence and the other proceedings which follow the completion of evidence. There must, in a case such as this, be an opportunity for thoughtful review after preliminary conclusions have been reached and there is too much risk of a compromise verdict being accepted by the jury or a majority of the jury under pressures of time and other personal consideration.

[Emphasis added by Sigurdson J.]

- [14] The plaintiff's claim is for damages for loss of the opportunity to recover additional damages from Surrey, by way of settlement or trial, which he alleges he could not recover because of the breach of duty of the defendant. Paragraph 10 of the statement of claim against Mr. Buxton speaks of the lost opportunity to recover damages from Surrey "by way of either settlement or judgment."
- [15] In assessing damages the plaintiff will ask this Court to look at his claim against the alleged negligent solicitor as if he had properly joined Surrey. If that had been done, the plaintiff asserts he could have been compensated by Surrey for losses that he could not obtain from the defendant Bond.
- [16] A difficulty with this assertion, for the purpose of the present application, arises from Ms. Bond's allegation in the personal injury action that the plaintiff was contributorily negligent. If the negligence of the plaintiff was proven, the liability of the defendants, Bond and Surrey, if any, would have been several only. The plaintiff could look to the defendants to compensate him only to the extent of their respective degrees of fault. If there was no contributory negligence found, the defendants' liability would be joint and the plaintiff could look to either defendant for all of his damages. See *Leischner et al v. West Kootenay Power and Light Company et al* (1986), 70 B.C.L.R. 145 at 172.
- [17] In negotiating a settlement, in the event Surrey had been joined, the plaintiff's legal advisers would need to consider the risk there would be a finding of contributory negligence and therefore several liability only. I have no means of assessing the extent of that risk but if it had become a reality, the outcome could have led to the plaintiff recovering less than the full measure of his damages. If, for example, the plaintiff was found 10% at fault; Bond 50% at fault; and no fault attached to Surrey, the plaintiff would be entitled to only one half his damages.
- [18] On hearing the trial judge's instructions on paragraph 10 of the statement of claim, a jury would need to understand the approach to the negotiations to settle the Personal Injury action taken by reasonably competent legal advisers which could have led to a settlement with a better outcome for the plaintiff than the one actually achieved. Having reached a conclusion on that difficult question, the jury would need to turn its mind to assessing damages in this action keeping in mind the trial judge's instructions that the assessment of damages for a lost opportunity is to be undertaken as described by the Court of Appeal in the *Nicols v. Warner, Scarborough, Herman & Harvey*, supra.
- [19] Those questions would require most anxious consideration by a judge alone and would make the task of charging the jury very onerous indeed.
- [20] In *Skretting Canada Inc. v. Westaqua Commodity Group Ltd.*, 2010 BCSC 1614, Verhoeven J. struck out a jury notice in a products liability action saying, at para. 77:

- [77] In a case like this it can be difficult enough for a judge sitting alone to properly instruct himself or herself as to the law applicable to the decision to be made. A judge sitting alone is able first to determine the real and necessary issues of fact and law applicable to the case. However, a judge sitting with a jury must charge the jury on one occasion on all of the law that may be applicable, depending upon what view of the numerous issues the jury may take. In this case, there is such a multiplicity of issues that the task of a judge in charging the jury would be all but impossible. In turn, the task of the jury would be overwhelming. Moreover, since the jury gives no reasons for its decision, no matter the result there is likely to be a difficult appeal.
- [21] Those words apply with equal force to the application before me. Accordingly, the jury notice will be struck. The defendant is entitled to his costs of this application in any event of the cause.

"Affleck J."

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Prepared on 28 October 2026 · Esheria