

CANADA / JUDGMENT

Pevach v. McGuigan Estate

2020 BCSC 1799

COURT

Supreme Court of British Columbia

DECIDED

20 November 2020

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2020 BCSC 1799 Pevach v. McGuigan Estate IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Pevach v. McGuigan Estate, 2020 BCSC 1799 Date: 20201120 Docket: M170178 Registry: Vancouver Between: Vicki Pevach, a mentally incompetent person, by her litigation guardian, The Public Guardian and Trustee Plaintiff And John David Wright, Executor of the Estate of Hugh McGuigan Defendant Before: The Honourable Mr. Justice Funt Voir Dire Ruling on the Admissibility of the Statement of Hugh McGuigan Counsel for the Plaintiff: D.R. Robertson R. Islam Counsel for the Defendant: J. Miller B. McFadden Place and Date of Hearing: Vancouver, B.C. November 16, 2020 Place and Date of Judgment: Vancouver, B.C. November 20, 2020

1. introduction

- [1] In this December 12, 2015 motor vehicle action, the plaintiff is not mentally competent. Since the motor vehicle accident ("MVA"), Mr. Hugh McGuigan, the driver of the car that struck the plaintiff, has died as a result of a cause wholly unrelated to the MVA. His estate is now the defendant.
- [2] The scheduled 20-day trial of this action started this Monday, November 16, 2020.
- [3] Mr. McGuigan admitted that on December 12, 2015, he was the driver of a car that collided with the plaintiff, a pedestrian at the time of the MVA, "at or near an unmarked crosswalk at 30th Avenue and 39A Street in the City of Vernon".
- [4] In his response to civil claim, Mr. McGuigan denied liability and that he "was negligent as alleged, or at all".
- [5] In his response to civil claim, Mr. McGuigan also denied that "the plaintiff suffered or continues to suffer any injury, loss, damage or expense as alleged in the notice of civil claim, or at all, and puts the plaintiff to strict proof thereof".
- [6] The plaintiff seeks to have admitted into evidence, for the truth of its contents, a recorded audio statement (and certified transcript) that Mr. McGuigan gave Constable King of the RCMP shortly after the collision.
- [7] For the reasons that follow, the plaintiff's application is granted.

2. background

- [8] As a result of an application brought by Mr. McGuigan and with the consent of the plaintiff, a consent order dated December 12, 2017 was obtained, which resulted in the production of the recorded audio statement.
- [9] On January 10, 2018, the recorded audio statement was received by defence counsel and then provided to plaintiff's counsel. The authenticity of the recorded audio statement has been admitted.
- [10] On February 28, 2018, Mr. McGuigan was examined for discovery. At the examination for discovery, Mr. McGuigan swore: Q Okay. And you told the truth to all of the insurance adjusters you've talked to and the police you spoke to? A Yes, I did, yeah. Q And you'd agree that you cooperated fully with the police on the scene and the insurance adjusters? A Yes. Q And would you agree that your memory of the accident was best in the weeks following the accident as compared to today? A Well, I rehash it in my mind all the time - Q Yeah. A -- so it's still right up front there, you know. So, I think it's just like it happened yesterday, you know -- Q Yeah. So, you still have a -- A in my mind. Yeah. Q You still have a fairly good memory of what happened? A Yes. Yes.
- [11] At Mr. McGuigan's examination for discovery, the recorded audio statement was not played nor was a copy of the certified transcript placed before him by plaintiff's counsel. Defendant's counsel (not counsel at trial) did not re-examine Mr. McGuigan at the examination for discovery.

3. analysis

- [12] A summary of the framework for the admissibility of hearsay evidence, can be found in *R. v. Khelawon*, 2006 SCC 57 at para 42 (in part):
- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
 - (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
 - (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
 - (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.
- [13] Admissions are an existing exception to the hearsay rule. With respect to admitting admissions, in *Saadati v. Moorhead*, 2013 BCSC 636, I stated:

- [43] I should note that the foundation for admitting admissions is different from that of the other traditional exceptions to the hearsay rule. As Justice Romilly described in *R. v. Violette*, [2008] BCSC 422:
- [63] Admissions, which in the broad sense refer to any statement made by a declarant and tendered as evidence at trial by the opposing party, are admissible as an exception to the rule against hearsay: *R. v. Foreman* (2002), 169 C.C.C. (3d) 489, 62 O.R. (3d) 204 (C.A.), citing J. Sopinka, S. Lederman and A. Bryan, *The Law of Evidence in Canada*, 2nd ed. (Markham, Ont.: Butterworths, 1999), at p. 291. The Court in *Foreman* went on to quote from Sopinka J. in *R. v. Evans*, [1993] 3 S.C.R. 653, at p. 664: The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-6, quoted in McCormick on Evidence, *ibid.*, p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.
- [14] The recorded audio statement falls under this exception to the hearsay rule.
- [15] In "rare cases" evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case: *Khelawon* at para. 42.
- [16] The case at bar is not one of the "rare cases".
- [17] With Mr. McGuigan's death, the necessity criterion is satisfied.
- [18] Mr. McGuigan's testimony at his February 18, 2018 examination for discovery reinforces the reliability of the recorded audio statement. Under oath he testified that he told the police the truth and cooperated with them. The statement was also made to an independent party shortly after the MVA and was recorded.
- [19] Under Rule 7-2 of the Supreme Court Civil Rules, counsel for Mr. McGuigan had the opportunity to re-examine his client if clarification of his testimony had been desired or other unanticipated matters had arisen during plaintiff's counsel's examination for discovery of Mr. McGuigan. It has not been suggested that Mr. McGuigan's counsel at the examination for discovery was not competent or otherwise did not act in a professional manner.

- [20] Defendant's counsel argues that statements given to police can give rise to a "number of serious issues", citing *Khelawon* where a videotaped statement to police was excluded as evidence. However, the usual rules regarding the tendering of statements as evidence in criminal proceedings do not apply in the civil context. In *Introducing Evidence at Trial: A British Columbia Handbook*, 3rd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2017), Justice DeWitt-Van Oosten (as a contributing author) wrote at 124: In criminal cases, the Crown may seek to tender a statement as evidence against the accused or for the purpose of cross-examination should the accused testify. In both cases, the Crown must meet a common-law threshold before it can tender a statement that was made to a "person in authority". Statements made to persons in authority by someone charged with an offence must be proven voluntary beyond a reasonable doubt before they can be admitted into evidence for the prosecution. The Crown's threshold burden is unique to the criminal law and not paralleled in civil matters.
- [21] In the case at bar, it is not suggested that Mr. McGuigan's statement was not voluntary or that it was, in some manner, coerced or influenced. As noted, Mr. McGuigan at his February 28, 2018 examination for discovery agreed that he had told the truth to the police without qualification and, as noted, he was not re-examined by his counsel.
- [22] Defendant's counsel also says that the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) may be engaged if the statement is used to impugn Mr. McGuigan's credibility.
- [23] The trial is in its early stages. At this time, I cannot say that that the rule in *Browne v. Dunn* will or will not be engaged. In my view, the matter is one of the weight to be given to the relevant evidence and does not go to the admission of the statement.
- [24] Further, defendant's counsel says that better evidence is available through the February 28, 2018 examination for discovery of Mr. McGuigan and, accordingly, the subject statement should not be admitted.
- [25] At the February 28, 2018 examination for discovery, reference to the subject statement was made but the statement was not put to Mr. McGuigan in its entirety. Again, it is a question of the weight to be given at the end of the hearing of all evidence in context.
- [26] I am satisfied that trial fairness will be served if the subject recorded audio statement is admitted into evidence.
4. conclusion
- [27] The December 12, 2015 recorded audio statement (and certified transcript) that Mr. McGuigan gave to Constable King of the RCMP may be tendered as evidence in the current proceedings for the truth of its contents.
5. costs
- [28] Costs may be addressed after the conclusion of the trial. "Funt J."

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