

CANADA / JUDGMENT

Rae v. Gadalla

2023 BCSC 2235

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2235 Rae v. Gadalla

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rae v. Gadalla,

2023 BCSC 2235

Date: 20231219

Docket: S196329

Registry: Vancouver

Between:

Robert Rae

Plaintiff

And

Samir Hanna Gadalla and Rofah Boulis Abdel-Malik

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

E. Lay

Counsel for the Defendants:

A. Johnson

Place and Date of Hearing:

Vancouver, B.C.

November 21, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 19, 2023

I. Introduction

- [1] This is an application by the defendants in this personal injury action seeking to have a mistrial declared.
- [2] The trial took place before me over five days, from July 10 to 14, 2023. Both liability and damages were in issue. On August 11, 2023, I released my reserved reasons for judgment, indexed as 2023 BCSC 1398, finding the defendants liable for the plaintiff's injury and awarding him damages of \$5,000. On October 13, 2023, I released a supplemental decision on costs, indexed as 2023 BCSC 1781. My order has not yet been entered.
- [3] The defendants have since filed an appeal from my trial decision. By agreement of the parties, the appeal proceedings have been stayed pending the outcome of this application.
- [4] The defendants now seek a mistrial on the basis that my liability analysis is said to rest on a manifest and fundamental factual error. They contend that I was led into that error by a number of inaccurate, incomplete or misleading closing submissions by counsel.
- [5] The plaintiff does not dispute that I have the jurisdiction to declare a mistrial even at this late stage of the proceeding. However, he argues that I ought not to grant that relief in the circumstances of this case. First, he says, my reasons for judgment contain no error of the kind alleged. Even if they did, he says, the defendants have waited too long to bring the application and, at this stage, the appropriate response, if one is called for, should be left for the Court of Appeal, rather than this court, to determine.
- [6] For reasons that follow, I have concluded that the application should be refused.

II. Facts

- [7] The question of liability at trial turned primarily on credibility. It was not disputed that the plaintiff, Mr. Rae, was injured on October 12, 2018, when the defendants' dog, known as "Flex", then in the care of the defendant, Ms. Abdel-Malik, bit or scratched the back of Mr. Rae's leg while they were riding in the elevator of the condominium building where the parties reside.

- [8] Mr. Rae's evidence was that Flex bit him without provocation as he was exiting the elevator. Ms. Abdel-Malik testified that Mr. Rae was merely scratched after he provoked Flex by tripping over his leg, causing Flex to bark and yell. In support of Ms. Abdel-Malik's account, the two defendants and their son, Remon Hanna, testified that they observed Flex limping for several days after the incident.
- [9] Foremost among the reasons I gave for rejecting the defendants' version of events was that I understood it to have been advanced for the first time only on the eve of trial. In listing the factors supporting my findings on credibility, I stated as follows:
- [47] Most troubling of all is the defendants' late-breaking allegation that Mr. Rae tripped over Flex and seriously injured him in doing so. The defendants amended their pleading on the eve of the trial in order to advance that allegation. There had been no mention of it on any of the previous occasions when, if there had been any truth to it, one would have expected them to raise it, such as in Dr. Gadalla's letter of January 26, 2019, their original response to the clam [sic] or on their respective examinations for discovery. In addition, I agree with Mr. Rae that if Flex had truly been showing the signs of injury that the defendants and Mr. Hanna described in their testimony, they would likely have taken him to a vet that same day or shortly thereafter.
- [10] My understanding as to when the defendants had first communicated that version of events was drawn from a number of sources.
- [11] The defendants' amended response to the claim, filed during the trial on July 13, 2023, showed the following allegations, all underlined, to have been newly added at that time:
10. The elevator stopped abruptly at the 20th floor and the plaintiff stumbled backward, inadvertently stepping on one of the Yorkshire Terrier's legs.
 11. The Yorkshire Terrier howled in pain and immediately and momentarily pawed scratched and/or bit at the instrument of its injury - the plaintiff's left sandal and leg.
 12. The Yorkshire Terrier remained on the leash held by Ms. Abdel-Malik.
 13. The sequence of events in the incident-the elevator's abrupt stop, plaintiff's loss of balance and his inadvertent injury to the dog, and dog's reaction to that injury- took less than two seconds (the "Incident").
 14. The plaintiff remained in the elevator with the Yorkshire Terrier and Ms. Abdel- Malik. The elevator continued to ascend from the 20th floor to the 27th without incident between the plaintiff and the Yorkshire Terrier.
 15. Ms. Abdel-Malik exited the elevator on the 27th floor with the Yorkshire Terrier and rushed home. The Yorkshire Terrier was limping-favouring one leg-and appeared to be injured and in pain.

[12] During the trial, Mr. Rae's counsel suggested to Ms. Abdel-Malik in cross-examination that the first time she had advanced the allegation that Flex had been injured in the elevator was during her testimony at trial. Ms. Abdel-Malik denied this.

[13] Mr. Rae's counsel suggested to Dr. Gadalla in cross-examination that:

- a) Dr. Gaddala did not allege that Flex had been stepped on and injured for "years" after the action was first brought and raised that allegation only recently; and
- b) he concocted the allegation of Flex's injury for the trial.

[14] Dr. Gadalla denied those suggestions.

[15] The written closing argument presented on behalf of Mr. Rae included the following submissions:

Dr. Gadalla testified that the plaintiff had stepped on and injured his dog, despite never making mention of such an instance in discovery or writing to the Strata.

The plaintiff submits that the stories of Dr. Gadalla, Mr. Hanna, and Ms. Abdel-Malik are fabricated and scripted in a concerted effort. The plaintiff submits that is why nothing was mentioned [as] to the Dog's injury until trial.

[16] Mr. Rae's counsel added the following closing submissions orally:

the pleadings were amended on the eve of trial, and that was the first time anyone really heard about the dog being hurt and all the circumstances involving the dog and the dog needing to be treated afterwards

The story of the dog being hurt was never mentioned up until the day before this trial. Not in their discoveries, nothing. The first time anyone heard anything about the dog being hurt was leading up to this trial.

[17] After receiving those submissions, I had the following exchange with defendants' counsel during his closing oral submissions in response:

Defendants' counsel: ...[T]he plaintiff's theory, developed over the course of the trial, is to explain the basic consistency of the testimony of the three witnesses for the two defendants ... by saying that it's self-serving and literally a conspiracy.... There surely has to be more of a foundation than just to say, "Isn't it convenient that all of their witnesses say basically the same story or corroborate each other's accounts in different ways."

The Court: Well, I think it's that and a combination of the fact that there isn't mention of this injury to the animal previously.

Counsel: So that's something I think at the break maybe we should make sure that we take ourselves to. Because... there is mention in the record of the animal being stepped on. I believe the sort of corroborating details of that--like the testimony about limping--have only come up more recently because those questions have only been asked more recently. ...

The Court: But I guess what would help me to know is if there's evidence before me that they made that claim prior to the trial anywhere. Is there evidence before me that they did?

Counsel: ... I don't want to overstate it, but there are some references that we need to pull for you from the examination transcript.

The Court: Well, but just a minute. The transcript in its entirety isn't before me. Only what was put to a witness was before me.

Counsel: Yes, so we'll need to refer to our notes [from trial] ... because there are references--both to different aspects of it, but also answers like "Well, you never asked me the question" or "Nobody ever asked me."

I would also point out that the son, Remon Hanna, wasn't a representative at discovery, didn't testify at the provincial court hearing, and my friend can speak to whether or not he spoke to that witness before trial.

[18] Defendants' counsel did not make further submissions on that topic. He did not raise any concern during the trial about the appropriateness or accuracy of the closing submissions I had just received from Mr. Rae's counsel, either privately with Mr. Rae's counsel, or in open court, with me.

[19] After the release of my trial decision and the filing of their notice of appeal, the defendants filed this application. The application is supported by a legal assistant's affidavit showing that the defendants had indeed, at various times prior to 2023, communicated at least some aspects of the version of events that they later presented at trial, including as follows:

- a) they pleaded in their original response to the claim, filed October 5, 2020, that Mr. Rae "fell onto, and made contact with, Flex";
- b) their counsel wrote to Mr. Rae's counsel on March 7, 2022, on a "without prejudice" basis, relaying that the anticipated testimony of Ms. Abdel-Malik would be to the effect that when Mr. Rae "moved to exit the elevator, he lost his balance and stepped on the dog's leg, causing it to cry out in pain and scratch at his leg" and that "Mr. Rae lost his balance and stepped on the dog's leg, causing it to howl in pain and walk with a limp";
- c) in a statement of facts recited in support of an interlocutory application filed May 27, 2022, they asserted that "the plaintiff - an elderly man with mobility challenges - stumbled and stepped on the small dog, which howled in pain and scratched in defence";

- d) on June 27, 2022, they testified on their respective examinations for discovery that Mr. Rae had provoked Flex by stepping on him (Ms. Abdel-Malik also testified during her examination for discovery that when Mr. Rae stepped on Flex, Flex reacted by making a noise); and
 - e) their counsel wrote to Mr. Rae's counsel on October 19, 2022, on a "without prejudice" basis, relaying that the anticipated testimony of Ms. Abdel-Malik would be to the effect that "Mr. Rae stumbled and stepped on the dog's leg, causing it to howl in pain, bite, and limp home."
- [20] No one referred in closing argument to the statement of facts pleaded in the defendants' original response to the claim filed on October 5, 2020. Of the remaining items listed above, none was put into evidence at the trial. Although parts of the defendants' discovery testimony were put to the defendants in cross examination, most of the discovery transcript extracts on which the defendants now rely were not.

III. Legal Framework

- [21] A mistrial may appropriately be declared where an error has been made or an irregularity has occurred that gives rise to a real danger of rendering the trial unfair or creating the appearance that it was unfair: *R. v. Davey*, 2012 SCC 75; *R. v. Cawthorne*, 2016 SCC 32. It is, however, a remedy of last resort, to be granted only where no other remedy is available to rectify the situation: *Csurdi v. Bannon*, 2019 BCSC 2280.
- [22] Because a notice of appeal from my decision has been filed, s. 17 of the Court of Appeal Act, S.B.C. 2021, c. 6, is also engaged. That provision states that all proceedings relating to an appeal must be in the Court of Appeal. It has been interpreted to confer a discretion on trial judges whose trial decisions are under appeal to decline to grant relief that is seen to be more properly within the purview of the Court of Appeal, such as where the trial judge is asked to revisit his or her earlier findings based on new evidence: *LLS America LLC (Trustee of) v. Dill*, 2017 BCSC 1782.
- [23] This mistrial application is similar in many respects to the one that came before Branch J. in *Manning v. Dhalla*, 2019 BCSC 1067. There, Branch J. declared a mistrial at a similar stage of the proceeding, following a verdict in a judge-alone trial and while an appeal was pending, based on grounds similar to those advanced here.
- [24] In setting out the nature of the court's jurisdiction and the principles governing its exercise in those circumstances, Branch J. stated as follows:
- [29] Where a final order has been pronounced but not entered, a judge has the discretion to re-open the hearing to hear new evidence, or otherwise reconsider the original judgment, including by declaring a mistrial: *Spirling v. Young*, 2005 MBQB 54 at para. 27; *Clayton v. British American Securities Ltd*, [1934] 3 W.W.R. 257 (B.C.C.A.); *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at paras. 36-37.

- [30] Judges have broad and inherent common law powers to declare mistrials in necessary circumstances: *van Ooyen v. Carruthers*, 2018 SKQB 73 at paras. 8-9; *R. v. Burke*, 2002 SCC 55 at para. 74.
- [31] In deciding whether to order a mistrial, the court must consider whether the irregularity is of sufficient scope or degree to prevent the prejudiced party from presenting his or her case fully, or from securing a fair adjudication on the merits: *Forsythe v. Tone*, 2018 ONSC 3598 at para. 23; *McDermott v. McDermott*, 2013 BCSC 534 at para. 239.
- [32] The court should consider whether the problematic event relates to a central or a peripheral issue: *R. v. Charles*, 2015 SKQB 381 at para. 33. The entirety of the surrounding circumstances must be examined: *van Ooyen* at para. 13. The court must determine whether there is a real danger of prejudice to a party, or of a miscarriage of justice occurring: *van Ooyen* at paras. 9, 11; *Burke* at para. 74. A strong case for a mistrial must be presented: *McDermott* at para. 240.
- [33] A declaration of a mistrial is a last resort, and will occur only where the court concludes that no other curative measure will suffice: *van Ooyen* at paras. 8-9; *Burke* at para. 76. The cost and delay associated with having a new trial is a factor to consider: *McDermott* at para. 240. In *Caswell v. Toronto R.W. Co.* (1911), 24 O.L.R. 339 (C.A.) at pp. 350-1, the court stated:

A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests, and may fairly be described as necessary evils, when necessary.

IV. Discussion

- [25] The threshold question to be answered on this application is whether my assessment of credibility rested on a manifest and fundamental misapprehension of fact, as the defendants contend.
- [26] I stated in para. 47 of my reasons for judgment on liability that the version of events advanced by the defendants at trial (namely, that Mr. Rae had "tripped over Flex and seriously injured him in doing so" [emphasis added]) was unworthy of belief because, among other things, I found it to be a recent fabrication. That version of events included three main elements, as follows:
- a) that Mr. Rae had tripped or stepped on Flex's leg;
 - b) that Flex was injured in the process; and
 - c) the injury was serious enough to leave Flex limping for several days afterward.

- [27] In rejecting that evidence on that basis, I looked to three prior instances when, had that story been true, one would have expected it to have emerged. Those incidents were:
- a) Dr. Gadalla's letter to the strata council of January 26, 2019;
 - b) the defendants' original response to the claim, filed October 5, 2020; and
 - c) the defendants' examinations for discovery on June 27, 2022.
- [28] My observation about the January 26, 2019 letter, the earliest of those instances and the only one that occurred prior to the commencement of this action, was correct and is not impugned on this application.
- [29] The same cannot be said about the remaining two instances upon which I relied. In particular, in both the original response to the claim and the defendants' examinations for discovery, the defendants put forward at least one element of the version of events later presented at trial, namely, that Mr. Rae had tripped or stepped on Flex. This is potentially problematic inasmuch as I said in para. 47 that if there was "any truth" to the defendants' story, one would have expected it to have been conveyed on each of those earlier occasions. As it turns out, at least part of it was, albeit in only the later two instances, but not the first.
- [30] On the other hand, in neither of those two more recent instances was there mention of an injury to Flex, let alone a lingering one. The additional extracts from the discovery transcripts that are now before me add only that, when asked to describe what happened in the elevator, Ms. Abdel-Malik testified that Flex made "a noise" when he was stepped on.
- [31] The absence of any mention, prior to 2023, of a lingering injury to Flex is important because the focus of my concern about recent fabrication, as reflected in para. 47 itself and the questions I put to defendants' counsel during his closing submissions, was on the injury to Flex and its alleged seriousness.
- [32] Although the defendants have now put forward new evidence showing that they had indeed asserted, prior to the "eve of trial", that Flex was injured, that allegation still appears to have emerged quite late in the lifetime of the dispute. In particular, it appears to have been communicated for the first time in "without prejudice" letters from the defendants' counsel dated March 7 and October 19, 2022. In those letters, apparently for the first time, their anticipated testimony was stated to be that Flex was "limping" on his way home after the incident. But even then, there was, as yet, still no suggestion of a limp lasting many days.
- [33] Overall, I am not persuaded that the new evidence presented on this application, even if it had been before me during the trial, would have materially affected my analysis as set out in para. 47. The rationale for finding a recent fabrication would, even then, have still remained essentially intact. Accordingly, I am not persuaded that my analysis of credibility rested on a critical misapprehension of the true facts, as the defendants contend.

- [34] This case is, in that sense, distinguishable from Manning. There, new information, previously unavailable due to the defendant's deliberate failure to disclose it as he should have, came to light only after the trial had concluded and a decision had been rendered in the defendant's favour. That information fundamentally undermined the basis of the trial judge's findings. The same cannot be said here.
- [35] Moreover, in this case, unlike in Manning, insofar as it became necessary for the defendants, in presenting their defence, to rebut Mr. Rae's allegation of recent fabrication, they had the opportunity to do so during the trial. They could have sought to do so in re-examination, such as by adducing evidence of any previous consistent statements they may have made. After hearing the closing submissions of Mr. Rae's counsel, they could have, either during the trial itself or shortly its conclusion, applied for leave to adduce additional evidence for that purpose.
- [36] In the end, they did none of those things. Instead, they waited until after my trial decisions were released and an appeal was underway to complain about how the trial had unfolded. I disagree with the defendants' submission that the need to rebut Mr. Rae's allegation of recent fabrication could only have become apparent to them with the release of my liability decision on August 11, 2023. That allegation was not a surprise. Unlike in Manning, the defendants learned nothing after the conclusion of the trial that they did not already know while it was underway. The defendants' failure to take curative steps at the appropriate time is another factor that weighs heavily against granting a mistrial now: *Morris v. Robinson*, 2019 BCSC 1467; *Giang v. Clayton*, 2005 BCCA 54.
- [37] For all of those reasons, I have concluded that the application for a mistrial should be refused. If any further relief is called for, it will be for the Court of Appeal to grant it.

V. Disposition

- [38] The application is refused.
- [39] In the event the application is refused, as it now has been, Mr. Rae seeks an award of "uplifted" costs, payable forthwith. Although I have refused to grant a mistrial, I accept that the issue raised on this application was attributable in part to closing submissions by Mr. Rae's trial counsel, upon which I relied in part, that turned out to have been less than entirely fair or factually accurate. For that reason, I have concluded that the appropriate order is for the parties to bear their own costs on this application.

"Milman J."

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