
CANADA / JUDGMENT

Roberts v. Pearson

2018 BCSC 504

COURT

Supreme Court of British Columbia

DECIDED

3 April 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 504 Roberts v. Pearson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roberts v. Pearson,

2018 BCSC 504

Date: 20180403

Docket: M110536

Registry: Kelowna

Between:

Grant Roberts

Plaintiff

And

Douglas Pearson and

Bennett Contracting Ltd.

Defendants

Before: Master Wilson

Reasons for Judgment

Counsel for the Plaintiff:

D. Frechette

Counsel for the Defendants:

P. Spinks

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 21, 2018

Place and Date of Judgment:

Kelowna, B.C.

April 3, 2018

- [1] The defendants apply for leave to amend their response to civil claim in this personal injury action to plead that both the plaintiff and the defendant Douglas Pearson ("Pearson") were working within the scope of their employment at the time of the accident.
- [2] By way of background, the subject accident occurred on June 3, 2014. The plaintiff is a concrete finisher and is currently 33 years of age. He worked subsequent to the accident, but he says he is now unable to do so and has been off work for almost two years. He applied for and received Part 7 benefits from ICBC relating to medical treatments necessitated by his injuries.
- [3] The notice of civil claim was filed on March 17, 2016, and a response admitting liability was filed on behalf of the defendants on July 29, 2016.
- [4] An examination for discovery of the plaintiff was conducted in 2017 and the trial is scheduled to commence in February 2019.
- [5] An application to amend the pleadings is brought pursuant to Rule 6-1 of the Supreme Court Civil Rules, which states the following:

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

- (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
 - (ii) written consent of the parties.

[6] The factors to be considered on an application to amend pleadings are set out by Madam Justice Ross in *G.A.D. v. BC Children's Hospital*, 2003 BCSC 443, at paragraph 17:

[17] The general principles to be applied in the consideration of an application to amend are as follows:

- (a) amendments should be permitted as are necessary to determine the real question in issue between the parties

The basic rule, set out expressly in the former Rules and no doubt still applicable, is that such amendments should be permitted as are necessary to determine the real question in issue between the parties. Rule 1(5) requires an interpretation of the rules which permit the just and speedy determination of the dispute on its merits. Similarly, the Law and Equity Act, R.S.B.C. 1979, c. 224, s. 10, requires the court to grant all such remedies as any of the parties may appear to be entitled to "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined. *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982) 30 B.C.L.R. (2d) 45 (S.C.);

- (b) the court will not give its sanction to amendments which violate the rules that govern pleadings, including the prohibition of pleadings which disclose no reasonable claim. In considering this question, the court will apply the same tests and considerations as applicable on an application to strike claims already pleaded, see *Victoria Grey Metro Trust Co.* supra;
- (c) a party is not required to adduce evidence in support of a pleading before trial, see *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (B.C.C.A.);
- (d) on an application to amend the facts alleged are taken as established, see *Canada (Attorney General) v. Ellis-Don Ltd.*, 2000 B.C.C.A. 111;
- (e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient, see *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.).

[7] The threshold to permit an amendment has been held to be a low one.

[8] The first mention of this possible amendment by the defendants was by way of telephone call between counsel on February 6, 2018. The evidence in support of the application is by way of an affidavit from an independent adjuster hired by the defendants' insurer, ICBC. The adjuster, Ms. Passmore, includes as an exhibit a statement she took from Mr. Sean Jaegli of Global Surface Solutions Inc., the plaintiff's employer at the time of the accident. She deposes that she interviewed Mr. Jaegli regarding the plaintiff's employment and performance, both before and after the accident and over the course of the interview Mr. Jaegli checked his records and advised that the plaintiff was actually working and being paid at the time of the accident. The statement is reproduced in its entirety below:

Voluntary Statement of Sean Jaegli

This is the statement of Sean Jaegli. I am the owner of Global Surface Solutions Inc. of 274 Champion Street, Kelowna, BC. Our phone number is 250-491-3141. I confirm that Grant Roberts was employed with Global Surface Solutions from April 3, 2014 to August 29, 2016, as a concrete applicator. I confirm that Grant Roberts was registered as a worker with WorkSafe BC while he was employed with our company.

On June 3, 2014, Grant Roberts was involved in a car accident. I have checked our payroll records which show he started work at 8:00 AM. He would have been paid from his 8:00 AM start time on this day, June 3, 2014. Grant would have loaded his vehicle and been on his way to Centuria where there was a job to do concrete work on a deck. I do not know if Jordie Cote was with Grant for certain. He may have been, but I am uncertain. Grant would on occasion take his own vehicle to a job site if he had an appointment after work. For the most part our employees travel to and from work sites in our company vehicles. We pay our employees for travel between work sites.

I do not believe he missed any work right after the accident, but he may have.

- [9] Ms. Passmore's affidavit does not include the payroll records referred to in Mr. Jaegli's statement. The plaintiff's evidence does include some questions and answers from the defendants' examination of the plaintiff for discovery wherein the plaintiff said that he was not working on the date of the accident.
- [10] The plaintiff swore an affidavit in response to the defendants' materials in which he describes his events of the day and confirms that he was not working at the time of the accident.
- [11] He deposes that he was driving his personal vehicle at the time of the accident, that he generally did not use his personal vehicle for work purposes as the employer had company vehicles, and that it was not uncommon for there to be a mistake in the payroll records. Further, the plaintiff says if it were raining or if rain was expected, he may not be able to work as rain would potentially damage the concrete he would be finishing. He says that there were circumstances where he may have been paid for a minimum four-hour shift even though he did not actually physically work. The plaintiff's affidavit includes a weather report of the date of the accident indicating rain.
- [12] The plaintiff took exception to Mr. Jaegli's statement. He says that the defendants are relying on Mr. Jaegli's statements for the truth of their contents and that the various documents that Mr. Jaegli said he referred to have not been produced and are not attached to the statement. He also says that the defendants breached his privacy rights by conducting an interview of his employer without his consent.

[13] With regard to the admissibility of Mr. Jaegli's statement for the truth of its contents, the authorities require the court to assume the facts as set out in the proposed amended pleading are true, not that I must accept the evidence in the affidavits in support of the application. I consider the affidavit and the attached statement to be the defendants' explanation for why the defendants are raising the new defence at this time. It is neither necessary nor appropriate for me to weigh or evaluate the evidence.

[14] On the issue of the possible breach of the plaintiff's privacy rights under the Personal Information Protection Act, S.B.C. 2003, c. 63, I do not propose to make any further comment on that issue. The plaintiff concedes that even if I were to disregard that evidence and either dismiss or adjourn the defendants' application, it is highly likely that the defendants would apply successfully for an order that the employer's file be disclosed. Information about whether the plaintiff was paid on the day of the accident would become apparent, the only consequence of which would be a delay of perhaps two months before the same matter was before the court. Such a delay would be of no benefit to either party.

[15] The primary consideration here is the issue of prejudice to the plaintiff. Pursuant to s. 10(1) of the Workers Compensation Act, R.S.B.C. 1996, c. 492, a worker who suffers personal injury as a result of the negligence of another worker has no right to sue:

10 (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

[16] However, if a worker is injured by someone who was not working at the time of the accident, the injured worker has the right to elect whether to claim compensation under the Workers Compensation Act or may bring an action:

10 (2) Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows.

[17] There are time limits imposed regarding applications for compensation under the Workers Compensation Act, which are set out in s. 55. The general rule is that an application must be filed within one year (s. 55(2)). However, if the Workers Compensation Board is satisfied that there existed special circumstances that precluded the filing of an application within one year, the Board can nonetheless pay compensation provided the application is filed within

three years of the underlying event (s. 55(3)). As the plaintiff points out, neither of these circumstances arise on the facts of this case as it is more than three years since the accident. The plaintiff says that any possibility for a claim under the Workers Compensation Act in the circumstances of his case is set out in s. 55(3.1) which states the following:

(3.1) The Board may pay the compensation provided by this Part for the period commencing on the date the Board received the application for compensation if

- (a) the Board is satisfied that special circumstances existed which precluded the filing of an application within one year after the date referred to in subsection (2), and
- (b) the application is filed more than 3 years after the date referred to in subsection (2).

[18] As such, if an application is filed more than three years since the accident, the plaintiff is not precluded from applying but any benefits he receives will be backdated only to when he made the application and not from the date of the accident.

[19] The plaintiff's position is if the amendment is allowed, it should be conditional upon an undertaking from the defendants' insurer that it will pay to the plaintiff the equivalent of the benefits he would have received under the Workers Compensation Act had he applied on time. He relies on *Parmar v. Virk*, (1995) 9 B.C.L.R. (3rd) 394 (BCCA), *Brzozowski v. Greyhound Canada Trans. Corp.*, [1998] B.C.J. No. 2400, and other cases as authority to require an undertaking as a condition of the amendment.

[20] In *Parmar*, the defendant had applied to raise the defence of s. 10 of the Workers Compensation Act (the "s. 10 Defence") before a master and the application was denied. The defendant appealed to a justice of the court who denied the appeal. The defendant then applied for leave to appeal before Goldie J.A. The application for leave to appeal was heard some 11 days before the proposed trial date.

[21] Goldie J.A. reviewed the effect of the s. 10 Defence and the prejudice to the plaintiff occasioned by s. 55 of the Workers Compensation Act. The court held that leave to appeal would be granted; however, he was prepared to do so on two conditions, first, that the plaintiff would be entitled to costs thrown away in preparation for the pending trial, it being obvious that the trial could not proceed if the amendment were granted, and the second condition addressed the issue of prejudice. At paragraph 26, Goldie J.A. set out the condition as follows:

26 Now as to the condition. If leave is granted and the ultimate result is a determination by the Board that it has jurisdiction but it declines to extend the limitation period in s.55 of the Board's Act with the result that the plaintiff is unable to apply for benefits then, in such event the Corporation undertakes in form acceptable to the plaintiff's solicitor to pay to the plaintiff the equivalent of the benefits he would have received if he had applied in time. Now, if counsel are unable to work out the terms of the undertaking and that need not be settled by Wednesday evening, I will be available.

[22] In Brzozowski, the plaintiffs were passengers on a Greyhound bus that flipped over, causing them injury. The s. 10 Defence was addressed in para. 6 of the decision as follows:

6 Counsel for the defendant, having ascertained that each of the plaintiffs was employed as an independent contractor diver-fisherman and, immediately prior to boarding the bus out of Prince Rupert had been working for various buyers from boats in Prince Rupert, at the Examination for Discovery held on November 19, 1997 raised what, for the sake of brevity, I will describe as the s.10 of the Workers Compensation Act, R.S.B.C. 1996, c. 492, issue.

[23] Owen-Flood J. concluded that he was obligated to permit the defendants to amend their statement of defence to plead the s. 10 Defence but went on to conclude that an undertaking similar to the one imposed by Goldie J.A. in Parmar was appropriate:

35 I am of the view that the reasoning of Goldie J.A., even though he was considering an application for leave to appeal, is equally pertinent in considering an amendment to plead a s. 10 defence where there has been, as there is at bar and was in the Parmar case, substantial delay in seeking the amendment.

36 The courts are concerned with matters of justice and substance as opposed to form. I am not persuaded in law by the argument to the contrary by counsel for the defendant. I am persuaded that I do indeed have the discretion to grant the term sought by the plaintiffs.

[24] Hinkson J. followed Owen-Flood J.'s decision in Brzozowski, in *Eugenio v. Dhillon*, 2007 BCSC 1906.

[25] For the reasons that follow, I conclude that the defendants should be permitted to amend the response to civil claim to include the s. 10 Defence, conditional upon their insurer providing an undertaking to the plaintiff similar to that in Parmar.

Discussion

[26] I am satisfied that the defendants have met the low threshold to justify an order to amend the response to civil claim to plead the s. 10 Defence. I accept that the possible s. 10 Defence has only recently come to the defendants' attention, and the defendants brought this application more promptly than in those cases. The trial is almost a year away.

[27] I find the interests of justice require that I allow the defendants to pursue the s. 10 Defence. I have reviewed the decisions in Brzozowski and Eugenio where the same amendment was permitted and there is nothing in this case that would distinguish it.

[28] I then turn to the question of whether the undertaking in Brzozowski and Eugenio should be imposed here.

[29] The defendants say that no undertaking ought to be imposed here because any prejudice the plaintiff suffers will be a consequence of his lack of candor in continuing to assert that he was not working when he ought to have filed a claim under the Workers Compensation Act.

- [30] One problem with the defendants' argument is that the defendants presuppose that the plaintiff was a worker at the time of the accident. The question of whether or not someone was within the course of employment at any particular moment can be a matter of some controversy and is something over which the Workers Compensation Board has sole jurisdiction to decide. The plaintiff has sworn that he was not working in his examination for discovery and in his affidavit. The plaintiff's evidence may well be accepted in its entirety.
- [31] Owen-Flood J. considered and rejected the argument that the plaintiff ought to have applied for benefits under the Workers Compensation Act in Brzozowski and his decision is binding on me unless it can be distinguished. I conclude that I must follow the court's decision in Brzozowski. Indeed, unlike in our case, there presumably could have been no doubt that the defendant in Brzozowski was working at the time of the accident given that he was driving a Greyhound bus.
- [32] In this case, the first the plaintiff was aware that the defendant Pearson was working at the time of the accident was February 6, the same date Pearson advised that he took the position the plaintiff was also working. The s. 10 Defence is only applicable if both the plaintiff and the defendant were working. Even if the plaintiff were working at the time of the accident, he would not have known there was a possible bar to his claim until he became aware the defendant was also working.
- [33] The defendants also say that the undertaking should not be imposed because its imposition in Brzozowski and Eugenio was due to the delay between when the defendant was aware of a possible s. 10 Defence and when the application was actually brought. I do not read those cases that way. If the court's concern had been the delay in bringing the application to amend the pleadings, the undertaking would presumably have only needed to address the prejudice resulting from when the defendant became aware of the s. 10 Defence and the filing of the application to amend.
- [34] The undertakings in Brzozowski and Eugenio are not so limited. Those undertakings required the defendant insurer to undertake to pay the equivalent of any benefits the plaintiff would have received but for the delay in making the application to the Workers Compensation Board without reference to the application to amend. I conclude that the undertaking was to address the prejudice to the plaintiff caused by the fact that the s. 10 Defence was raised after the expiration of the presumptive limitation period in s. 55(1) of the Workers Compensation Act.
- [35] Finally, the defendants say that if I am inclined to permit the amendment conditional upon the undertaking, that I should instead adjourn the application in order that the defendants have an opportunity to review the plaintiff's entire employment file, which they say I should order produced at this time. I am not prepared to do this for two reasons:

- a) Production of the employment file would not be determinative of whether the plaintiff was acting within the scope of his employment at the time of the accident; and
 - b) The determination of whether or not a person such as the plaintiff was within the scope of their employment is a matter within the sole jurisdiction of the Workers Compensation Board and is thus not something this court has the authority to decide.
- [36] In the circumstances, I am prepared to permit the defendants to amend their response to civil claim, conditional on their insurer providing an undertaking that if the Workers Compensation Board determines that it has jurisdiction but refuses to extend the limitation period to allow the plaintiff benefits from the date of the accident, the insurance company will pay the equivalent of any benefits the plaintiff would have received save for the delay in making the application to the Board, less any benefits paid to the plaintiff pursuant to Part 7.
- [37] The reference to benefits commencing at the date of the accident is to address the plaintiff's concern that since more than three years has elapsed, there is a risk pursuant to s. 55(3.1) of the Workers Compensation Act that benefits would only be paid from the date of the application. This may or may not be a concern given that the plaintiff did not cease work entirely until 2016. The reference to Part 7 benefits already paid addresses the concern of the defendants as to the potential for double recovery.
- [38] In keeping with the court's decisions in Brzozowski and Eugenio, costs of this application will be in the cause.

"Master Wilson"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/05/2018BCSC0504.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/roberts-v-pearson-2018>

Prepared on 26 October 2026 · Esheria