

CANADA / JUDGMENT

## Scheffer v. Everett

2014 BCSC 118

### COURT

Supreme Court of British Columbia

### DECIDED

27 January 2014

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2014 BCSC 118 Scheffer v. Everett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Scheffer v. Everett,

2014 BCSC 118

Date: 20140127

Docket: 10-3795

Registry: Victoria

Between:

Tyson Scheffer

Plaintiff

And:

Michael James Everett, Upstairs Cabaret Ltd.,

Upstairs Cabaret (2009) Ltd.,

Upstairs Cabaret Ltd. doing business as Upstairs Cabaret,

Upstairs Cabaret (2009) Ltd. doing business as Upstairs Cabaret,

Loula Cary Mearns, Brad Billet, Paul Ducharme, John Doe #1, John Doe #2

Defendants

And:

Michael James Everett, Upstairs Cabaret Ltd.,

Upstairs Cabaret (2009) Ltd.,

Upstairs Cabaret Ltd. doing business as Upstairs Cabaret,

Upstairs Cabaret (2009) Ltd. doing business as Upstairs Cabaret,

Loula Cary Mearns, John Doe #1, John Doe #2

Third Parties

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Plaintiff:

R. W. Cameron and N. L. Mason

Counsel for the Defendants/Applicants

Upstairs Cabaret Ltd., Brad Billet,

Paul Ducharme:

A. M. Bookman

Counsel for the Defendant

Michael James Everett:

G. N. Smith

Place and Date of Trial/Hearing:

Victoria, B.C.

June 27, 2013

Place and Date of Judgment:

Victoria, B.C.

**January 27, 2014**

- [1] This is an application by the defendants Upstairs Cabaret Ltd., Brad Billet, Paul Ducharme, and John Does #1 and #2 (the applicants) for an order pursuant to Rule 9-7 of the Supreme Court Civil Rules that the plaintiff's action against them be dismissed and that liability be apportioned between the parties. In the alternative, the applicants seek an order that the issues of liability and damages be severed pursuant to Rule 12-5(67) so that the matter would proceed to trial on the issue of liability of the applicants with the issue of damages to be tried later if necessary. The plaintiff is opposed to the application.

- [2] The plaintiff's action is for damages arising from injuries he received as a result of an altercation with the defendant Michael Everett at the Upstairs Cabaret, a local nightclub in Victoria, British Columbia on the night of November 13 and early morning of November 14, 2009.
- [3] The defendants Billet, Ducharme and John Does #1 and #2 were all employed by the defendant Upstairs Cabaret Ltd. at the time of the incident. Mr. Ducharme was employed as a bartender and is a friend of Mr. Everett. Mr. Billet was the head of security staff at the club.
- [4] At the time, Mr. Everett worked as a bartender at another licensed premise in Victoria, but he was not working on the night of November 13, 2009. He had dinner with friends and had consumed about six pints of beer between the hours of 9:00 p.m. and midnight. At approximately 1:00 a.m., he went to the Upstairs Cabaret intending to visit Mr. Ducharme, who was working as a bartender that night. After entering the club, he went directly to the area of the bar where Mr. Ducharme was working and he sat on a stool at the end of the bar.
- [5] There is a surveillance camera mounted near the ceiling of the club that recorded the events surrounding the incident. The surveillance video shows the bar and Mr. Ducharme working behind the bar, as well as two other bar staff. Mr. Everett could be partially seen on the right side of the picture when he was sitting at the bar and was fully visible on the video when he got off his stool and moved towards the centre of the camera's coverage. The plaintiff was with his girlfriend and his brother, as well as other friends, at the club that night. There is some evidence that the plaintiff was affected by the consumption of alcohol.
- [6] At one point the plaintiff was attempting to sit on a bar stool but lost his balance and the stool slipped out behind him and he landed on the floor. After that, he was involved in an argument with his girlfriend. Mr. Everett was apparently upset by the plaintiff's conduct towards his girlfriend, and spoke to the plaintiff about it. The plaintiff then approached Mr. Everett and the two exchanged words. Mr. Everett says that the plaintiff threatened him and said that he would have his friends deal with him.
- [7] At one point on the video, the plaintiff can be seen to move very close to Mr. Everett and put his face close to Mr. Everett's face. He put his arm partly around Mr. Everett's neck and pointed his finger in his face. Mr. Everett says at that point, the plaintiff was threatening him. Moments later, Mr. Everett picked the plaintiff up around his torso area, turned him upside-down and dropped him. The plaintiff apparently landed on his head and was unconscious for a few minutes on the floor. He alleges that as a result of the incident, he experienced a closed head injury, a fractured vertebra in his neck, and prolonged depression.
- [8] The plaintiff alleges that Mr. Everett is liable for damages for assaulting him and/or negligence. The plaintiff also claims that Upstairs Cabaret Ltd. and the individual applicants are liable for negligence and a breach of the duty of care imposed by the Occupiers Liability Act, R.S.B.C. 1996, c. 337.

- [9] The evidence establishes that the Upstairs Cabaret can accommodate up to 300 people. The lighting inside the club is typically quite low and there is loud music. The club was at or near its capacity on the night of November 13, 2009.
- [10] The club employs security staff to monitor the patrons of the club. There were seven security staff and a security supervisor on duty on the night of the incident. The members of the security staff were deployed so that three staff members were monitoring the door of the club, one was monitoring the outside smoking area of the club, and three others roamed inside the club. The security supervisor also roamed inside the club. The members of the security staff were all identifiable by their distinctive clothing.
- [11] Mr. Ducharme does not recall serving or observing the plaintiff prior to the confrontation between the plaintiff and Mr. Everett. The applicants say there is no evidence of any conduct by the plaintiff that should have caused the employees of the club to intervene. There was no pushing or shouting, but only an exchange of words between the plaintiff and Mr. Everett when they were in close proximity to each other.
- [12] The plaintiff's fall to the floor from the bar stool appears to have been noticed by other patrons, but not by Mr. Ducharme or any other employee of the club. The plaintiff got up quickly and began talking with his girlfriend. Mr. Everett noticed the interaction between the plaintiff and his girlfriend, and his intervention was the start of the difficulty between him and the plaintiff. There is no evidence that any of the employees of the club saw the activity between the plaintiff and his girlfriend, or between the plaintiff and Mr. Everett. The surveillance video reveals that the time from Mr. Everett's arrival at the club to the incident between the plaintiff and Mr. Everett was only a few minutes.
- [13] The applicants say that the security staff arrived very quickly after the plaintiff was injured. They say that the video indicates that the first member of the security staff arrived within approximately 30 seconds. The second member of the staff arrived moments later. The situation was immediately controlled, the plaintiff was assisted and Mr. Everett was escorted from the bar area to a place near the door of the club where he was detained and told to lie on the floor of the club until the police arrived. Mr. Everett says that friends of the plaintiff assaulted him by kicking him while he was on the floor. After the arrival of the police, he was escorted to the police station and was later released.
- [14] The applicants say there is no evidence upon which they can be found liable for the plaintiff's injuries. They submit that a full trial of this matter will take at least 15 days and involve considerable expense, including the costs of several expert witnesses. They submit a summary trial is the most cost effective way of resolving this matter.
- [15] Mr. Everett has filed a response to the notice of civil claim and has issued a third party notice against the defendant Upstairs Cabaret Ltd. and others. The defendant Upstairs Cabaret Ltd. has issued a third party notice to Mr. Everett.
- [16] Rule 9-7(15) of the Supreme Court Civil Rules provides:

- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
  - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
  - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
  - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
  - (c) award costs.
- [17] The applicants say this case is suitable for determination upon summary trial. They rely on the decision of *Hartley v. RCM Management Ltd.*, 2010 BCSC 579. *Hartley* was a similar case in that the plaintiff was injured as a result of an altercation that took place in a nightclub. The evidence in that case was that a very loud argument or altercation went on for some two to two and one-half minutes prior to intervention by the nightclub staff. The court held that that period of time was more than enough time for the club security staff to intervene. The court held that having failed to do so, the club owners were 35% liable for the injuries. The court found that there was no conflict in the affidavit evidence as to what had occurred.
- [18] At para. 25 of the decision, the court noted that the corporate defendants, as the owners of the nightclub, were not insurers of the plaintiff's safety. However, given the fact that there were five security staff on duty that night, and that the argument was accompanied by yelling, pushing and shoving, there was ample time for the staff to intervene and they were found to be negligent for not doing so.
- [19] In this case, the time between the exchange of words between the plaintiff and Mr. Everett and the incident itself was very brief. There is no evidence of a loud altercation or any pushing and shoving between the two principals. The video clearly shows that Mr. Ducharme's attention was not diverted towards Mr. Everett and the plaintiff, or the plaintiff and his friends, until such time as the incident was over.
- [20] The applicants say further that the evidence as to the plaintiff's level of intoxication is equivocal. They argue that if the plaintiff was not intoxicated, then pursuant to the Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, there was no reason to deny him entry to the premises or to refuse to serve him alcohol. They submit there was no reason to remove the plaintiff from the premises or to otherwise attempt to control his behaviour at any time prior to the time he was injured.
- [21] In his response to the application, the plaintiff submits that there was an indication that the plaintiff and Mr. Everett were about to engage in an altercation. He submits that there were signs of intoxication displayed and other signs of hostility between him and Mr. Everett. The plaintiff notes that the argument between him and Mr. Everett attracted the attention of some other patrons of the club prior to the incident.

- [22] The plaintiff submits that the surveillance video shows that he was somewhat off-balance directly in front of the bar where Mr. Ducharme was working and captured his fall from a bar stool in the same general area. He says that Mr. Everett was concerned enough to get up and move the bar stool out of the way, and then intervened again in the discussion between him and his girlfriend. Following that, the video shows that the plaintiff was in very close proximity to Mr. Everett. The plaintiff submits that the staff of the nightclub should have taken notice and sought to control the situation. Indeed, at his examination for discovery Mr. Everett said that as an experienced bar employee, had he been working when he observed the plaintiff's behaviour, he would have either asked for assistance or asked him to leave the bar.
- [23] The leading case on summary trial is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at para. 54, a case involving the previous Rule 18A. In that case, the court said:
- [54] In deciding whether the case is an appropriate one for judgment under Rule 18A the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue.
- [24] The court noted at para. 47 of *Inspiration Management* that the court should be careful, but not timid, in using the summary trial process for the purpose for which it is intended.
- [25] The court in *Inspiration Management* also said that when deciding whether it would be unjust to determine the matter by way of summary trial, the court should consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reasons of delay, the cost of taking the case forward to a convention trial in relation to the amount involved, the course of the proceedings, and any other matters which arise for consideration. That test was modified slightly in *Marine Masters Holdings Ltd. v. Greater Victoria Harbour Authority*, 2009 BCSC 953 at paras. 4 and 5. However, the court also noted at para. 3 that the court must proceed cautiously. Macaulay J. stated:
- [47] Further, the court must be cautious in determining discrete issues under the rule as doing so may not dispose of the entirety of the proceedings yet result in considerable delay and uncertainty pending the outcome of an appeal. Depending on the outcome of the particular appeal, it may eventually be necessary to continue the proceedings to deal with the other issues. Such a result is time consuming, expensive and runs the risk of defeating the end goal of a just, speedy and inexpensive determination on the merits of all issues. The Court of Appeal has repeatedly warned of the danger of litigating "in slices" for these reasons: *Bacchus Agents (1981) Ltd. v. Philippe Durand Wines Ltd.*, 2002 BCCA 138, at para. 7; *B.M.P.*

Global v. Bank of Nova Scotia, 2003 BCCA 534; and Dahl v. Royal Bank (2005), 46 B.C.L.R. (4th) 342 (C.A.).

- [26] The plaintiff says that this matter is not suitable for disposition by way of summary trial. He submits that the damages are potentially quite large given the serious nature of his injuries and their ongoing effect. The plaintiff's claim includes a loss as a result of the impairment of his ability or capacity to earn income. He submits further that as yet, he has not been able to quantify his claim or obtain all of the needed expert reports.
- [27] The plaintiff says that determining only the issue of liability on summary trial effectively creates a severance of the issues of liability and damages. He argues that the normal practice is for liability and damages to be heard together and adjudicated at the same time. He argues that a trial on both liability and damages is necessary in this case so that a proper and full assessment of credibility and an appreciation for the extent of the plaintiff's injuries can be achieved.
- [28] The plaintiff also submits that there is a high onus on the applicant that requires extraordinary, exceptional or compelling reasons to sever the issue of liability from quantum. See *Hynes v. Westfair Foods Ltd.*, 2008 BCSC 637, where Bruce J. stated the test in this way:
- [33] The plaintiff must show that they have an exceptional or extraordinary case in which either the trial of liability or damages will not be complicated, where the issues of liability and damages are not intertwined, and where there is some evidence that makes it as least probable that a separate trial on the issue of liability will put an end to the action.
- [29] The plaintiff submits that the facts in this case are complicated given the claims made by the plaintiff. In addition, the applicants have issued a third party notice against the defendant Everett, and the defendant Everett has issued a third party notice against the applicants. Thus, the plaintiff says that a determination of liability will not necessarily put an end to the action. Finally, the plaintiff argues that the issues of liability and damages are intertwined with the issue of causation which is an integral element of negligence. The plaintiff also notes that there will be conflicting evidence with respect to the plaintiff's level of intoxication or impairment at the time of the incident.
- [30] The plaintiff relies on *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2009 BCSC 1592, where the court stated at para. 24:
- [24] It will always be the case, where a defendant succeeds on the issue of liability in a severed trial, that there will be no need to determine damages and the action will be at an end. If that were all that was required, an argument could be made for severance in every proceeding. Yet it is clear that severance is the exception rather than the rule in civil trials. In my view, in relation to this criterion, something more must be demonstrated to justify severance. The burden is on the applicant to adduce some evidence to demonstrate that a finding in favour of the plaintiffs on liability would increase the probability that the

litigation would end, for example by settlement.

- [31] The applicants submit that in the event the issue of liability and apportionment are determined on summary trial, the prospects for settlement will be much greater. They submit that either a process of arbitration or mediation or a judicial settlement conference may well lead the parties to a final agreement. The plaintiff disagrees with that submission and says that the parties will still need to canvass expert reports and all of the facts of the incident before a realistic estimate of damages can be made. Obviously, in the event the applicants are successful in having the action against them dismissed, then they will not need to be part of that process. However, in the event there is some liability assessed to the applicants, they will still have to proceed to the exercise of investigating and assessing damages no matter how small the apportionment of damages is. While a definite answer on the issue of apportionment may well assist the parties in coming to a settlement, it is equally likely that a properly conducted judicial settlement conference or mediation could achieve the same result without severing the issues of liability and damages.
- [32] In answer to those submissions, the applicants refer to the decision of *Gichuru v. Pallai*, 2013 BCCA 60. In that case, an application for summary trial by the defendants in a libel action was successful. The court found that there was no evidence that the defamatory words were published or that anyone outside of the lawsuit had ever read any posting. A prior human rights complaint against the defendant had been dismissed as having no reasonable prospect of success. On appeal, the court upheld the dismissal of the claim at summary trial and at para. 37 stated:
- [37] As to the suitability of a summary trial otherwise, there was a discrete threshold issue to be determined in this case that did not involve any issues of credibility, complexity or conflicting evidence, i.e., the issue of publication. If it could be determined, it would end the litigation and avoid the expense of a potentially lengthy trial. I can see no error in the trial judge's exercise of discretion to decide Mr. Gichuru's claim against the respondents summarily in these circumstances.
- [33] The applicants also referred to *Middelaer v. Delta (Corporation)*, 2013 BCCA 189. In that case, the Court of Appeal upheld the trial judge's decision not to grant judgment on summary trial on the basis that the court can only reach a just result by having a proper full viva voce trial involving all of the parties.
- [34] The applicants note that in *Gichuru* and *Middelaer* the court dealt with the issues of summary trial without commenting on the issue of severance. The point to be made is that it is at least possible to dismiss the plaintiff's claim as against some of the defendants and leave the matter to proceed against Mr. Everett. I accept that that is so; however, it was obvious from *Gichuru* that upon dismissal of the plaintiff's claim against the defendant, the litigation would be at an end.

- [35] Clearly, in this case, even if the applicants are successful in having the claim against them dismissed in its entirety, the litigation will still continue as between the plaintiff and Mr. Everett. Presumably, the third party notice of Mr. Everett would fall with the decision on summary trial. However, that would leave the trial judge bound by the decision of the summary trial judge with respect to any liability of the applicants. That is an unsatisfactory result. See *Thomson v. Kootenay Lake District Hospital and Health Services Society* (1985), 68 B.C.L.R. 142 at para. 7. See also *Kaba v. Cambridge Western Leaseholds Ltd.*, [1997] B.C.J. No. 2152.
- [36] The plaintiff says that the issue of his level of intoxication may be a critical issue in determining liability of the applicants. He submits that issue is also relevant to the decision of liability on summary trial. The plaintiff referred to *Prevost (Committee of) v. Vetter*, 2002 BCCA 202 at para. 26, where the court stated:
- [26] As well, in the circumstances it would be unjust to the appellants (and perhaps to Desiree Vetter) to decide these issues on a summary trial because the decision would saddle them with important findings of fact that are adverse to them on the undecided issue of causation or would, at the least, make it awkward for the trial judge to find contrary facts. Similarly, the findings of intoxication in relation to Desiree Vetter may embarrass the next trial judge on the issues of contributory negligence, since the nature and the degree [of] Desiree's fault, if any, will be weighed in the balance. Where there is such an overlapping of issues, one issue ought not to be tried discretely on a summary trial: see *Kaba v. Cambridge Western Leaseholds Ltd.*, [1997] B.C.J. No. 2152 (C.A.).
- [37] Given the facts and issues in this case, it is my view that it is unsuitable to be dealt with by way of an application for dismissal of the claim against some of the defendants. While the facts are relatively simple, the nature and extent of the claimed injuries of the plaintiff and the third party notices filed by the defendant Everett against the applicants, and the applicants against the defendant Everett, result in some complexity. The amount involved could be large and the litigation will still continue against Mr. Everett. It is my view that it would be unjust to dispose of the claim against the applicants on summary trial and conclude that the matter is best dealt with by a full viva voce hearing at trial.
- [38] The potential prejudice asserted by the applicants only exists if the result at summary trial was a finding that they have no liability whatsoever. Such a finding would effectively determine the defendant Everett's third party notice against them as well. However, in the event there is some liability found against the applicants, or any of them, all of the expert reports with respect to damages will have to be obtained and that issue fully investigated.
- [39] It is my understanding that the parties have reserved trial time in September of this year and thus, any prejudice by way of delay is not likely to be overly long.
- [40] The application for summary trial with respect to the applicants is dismissed. Costs will be in the cause.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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