

CANADA / JUDGMENT

Sidhu v. Vivier

2020 BCSC 347

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 347 Sidhu v. Vivier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Vivier,

2020 BCSC 347

Date: 20200310

Docket: M125363

Registry: Vancouver

Between:

Arshdeep Singh Sidhu

an infant by his litigation guardian Kuljivan Singh Dhaliwal

Plaintiff

And

Robert Vivier, Williams Roofing & Drainage Ltd.,

Rajvinder Singh Sidhu and Balwinder Kaur Sidhu

Defendants

Before: The Honourable Madam Justice Forth

Oral Reasons for Judgment on Severance

Counsel for the Plaintiff:

M. J. Slater, Q.C.

Counsel for the Defendants Robert Vivier, and Williams Roofing & Drainage Ltd.:

R. Langille

Counsel for the Defendants and Third Parties, Rajvinder Singh Sidhu and Balwinder Kaur Sidhu in Action M082472:

Counsel for the defendant and third party, Surinder Singh Rattan in Action M082472:

Counsel for the third party, Insurance Corporation of British Columbia

in Action M082472:

Counsel for the Defendants and Third Parties, Nissan Canada Inc., Nissan Motor Co. Ltd., Nissan North American, Inc, and Abbotsford Nissan in Action M082472:

L. Dineley

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Place and Date of Hearing:

Vancouver, B.C.

February 24, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 10, 2020

Introduction

[1] The defendants, Robert Vivier and Williams Roofing & Drainage Ltd. (the "Vivier defendants"), apply to have the trial of this action (the "Vivier Action") heard separately from action M082472 and other related actions, being SCBC Actions No. S152491, M083325, M083848, and M101392 (collectively, "the Other Actions").

[2] The plaintiff in this action was involved in a motor vehicle accident on March 30, 2008 (the "First Accident"). As a result of the injuries in the First Accident, the plaintiff is a ventilator-dependent quadriplegic. He was 9 years old at the time of the First Accident.

- [3] On April 15, 2011, when the plaintiff was 12 years old, he was involved in a second motor vehicle accident (the "Second Accident"), which is the subject of the Vivier Action. The plaintiff was a passenger in a vehicle driven by the defendant, Rajvinder Singh Sidhu, and owned by the defendant, Balwinder Kaur Sidhu, when it was rear-ended by a vehicle driven by the defendant Mr. Vivier and owned by the defendant Williams Roofing & Drainage Ltd.
- [4] At the time of the Second Accident, the plaintiff was in the back of a van in a wheelchair that was secured to the vehicle.
- [5] Although liability has not been admitted in the Second Accident, it is unlikely to be an issue considering that the plaintiff was a passenger in a vehicle that was rear-ended. The issue at trial respecting the plaintiff will be the injuries he sustained in the Second Accident and the quantum of damages.
- [6] I will now return to the First Accident, which generated five actions. These actions were:
- a. M082472 - Arshdeep Singh Sidhu v. Hiebert (the "Hiebert Action") - initially, a motor vehicle claim only arising from the First Accident, but was later consolidated with the Nissan Action referenced below;
 - b. M083848 - Balraj Singh Sidhu v. Hiebert - a claim brought by another passenger in the First Accident;
 - c. M083325 - Balkran Singh Gill v. Hiebert - a claim brought by another passenger in the First Accident;
 - d. M101392 - Balwinder Sidhu v. Hiebert - a claim brought by Ms. Sidhu, the driver, in the First Accident;
 - e. S152491 - Arshdeep Singh Sidhu v. Nissan Canada Inc. (the "Nissan Action") - a products liability claim against various Nissan corporations relating to the alleged negligence in the design, manufacture, distribution, and sale of the 2006 Nissan Pathfinder involved in the First Accident. This action has been consolidated with action M082472, the Hiebert Action, to form the "Consolidated Action".
- [7] The other defendants in the Vivier Action, being the plaintiff's parents, consent to the severance. The plaintiff, in his application response, took the position that he would consent to the severance and a setting of a new trial date on the following terms:
1. That the parties agree to redact all materials and make no mention of the Second Accident to the trier of fact during the trial of the Consolidated Action and that the issue of liability of the applicants to the plaintiff shall not be put to the trier of fact in the Consolidated Action ("Term 1"); or alternatively
 2. That the applicants agree to be bound by any apportionment of damages against them, if any, made by the trier of fact at the trial of the Consolidated Action ("Term 2").

- [8] Plaintiff's counsel advised at the hearing of this application he was no longer pursuing the redaction of all materials as requested in the first paragraph of Term 1 since the Consolidated Action was no longer a jury trial.
- [9] The Nissan, ICBC, and Rattan defendants in the Consolidated Action state in their application responses that they take no position on the orders sought by the Vivier defendants.
- [10] In Nissan's application response, they oppose the terms sought by the plaintiff. Since the plaintiff has abandoned the redaction of materials, it is no longer an issue. Nissan opposes paragraph 2 of Term 1 and Term 2 on the basis that a trier of fact cannot award damages against a non-party. In essence, the Nissan defendants want to preserve their right to argue at the trial in the Consolidated Action that the Second Accident caused or contributed to the plaintiff's injuries and resulting damages. They wish to preserve the ability of the trier of fact to apportion fault between all tortfeasors, including the defendants in the First and Second Accident.

Background Facts

- [11] I have been the case management judge assigned to all of these actions since June 2017. Prior to my case management appointment, the parties in all of the actions had agreed to a Litigation Management Order dated February 6, 2017 that provided the Nissan Action be consolidated with the Hiebert Action under SCBC Action No. M082472. It was agreed the Other Actions would not be litigated, case managed, or tried with the Consolidated Action, subject to the direction of the trial judge in the Other Actions.
- [12] On July 13, 2017, at the first judicial management conference in the Actions, I directed that counsel in the Other Actions need not attend any further judicial management conferences unless otherwise advised.
- [13] On September 6, 2017, at the second judicial management conference, I directed that the Vivier Action be heard at the same time as the trial of the Consolidated Action.
- [14] On November 9, 2017, at the third judicial management conference, I made the Second Litigation Management Order that provided at paras. 36 and 37:
36. The Trial of the Consolidated Action and Vivier Action shall be heard together, subject to the agreement of the parties or the direction of the Trial Judge.
37. Any party has the right to apply to sever the Vivier Action from the trial of the Consolidated Action.
- [15] The Consolidated Action is scheduled to proceed to trial on March 23, 2020 for 73 days. The complexity of the action can best be understood by a reference to the reasons, indexed at 2020 BCSC 183, in which I struck the jury notice.

- [16] There have been approximately 100 expert reports served, authored by 55 different experts. It is anticipated that there will be extensive documentation filed, particularly respecting issues relating to the liability of the Nissan defendants.
- [17] The plaintiff has been extensively assessed by a vast variety of medical experts retained by the plaintiff and defendants in the Consolidated Action.
- [18] The submission of the Vivier defendants is that the only damages issues that will likely be contested at the trial of the Consolidated Action will be: the plaintiff's life expectancy, his future wage loss, and his future care costs. They submit that none of these issues have been impacted by the injuries, if any, sustained in the Second Accident.
- [19] The plaintiff was rendered a ventilator-dependent quadriplegic in the First Accident. There is no evidence, expert or otherwise, that supports that the Second Accident will, in any way, impact the quantum of those heads of damages.
- [20] It also appears highly likely that this plaintiff with these catastrophic injuries will be entitled to the maximum non-pecuniary damages available.
- [21] The evidence of the injuries suffered in the Second Accident in the clinical records is:
- a) The plaintiff was taken to Abbotsford General Hospital for examination on April 15, 2011 and no injuries were noted. He had a chest x-ray that showed some density in the lung but an underlying substantial pulmonary contusion arising from the Second Accident was ruled out. The plaintiff was discharged after a couple of hours.
 - b) The first visit to a treating doctor, an ophthalmic surgeon, after the Second Accident was on April 21, 2011, six days later. The visit was for eye issues and there was no mention of any injuries sustained in the Second Accident;
 - c) The next visit to a treating doctor was with the plaintiff's paediatrician, on May 10, 2011, where there was no injuries reported. It appears from the report that only Rajvinder Sidhu, the plaintiff's father, attended to discuss "ongoing issues." There is a reference to the Second Accident and it appears that the father reported having a seatbelt injury and was short of breath for one week;
 - d) The clinical records of the plaintiff's general practitioner for May, June, and July 2011 make no mention of the Second Accident; and
 - e) The extensive medical attendances of the plaintiff in the years since the Second Accident contained no documented complaint or symptom being attributed to the Second Accident.
- [22] The following references are made to injuries in the Second Accident in examination for discoveries:
- a) Examination for discovery of the plaintiff on August 31, 2018 - he stated he sustained no injury in the Second Accident;

- b) Examination for discovery of Ms. Sidhu, the plaintiff's mother, on August 9, 2018 - she stated that her son had a lot of swelling to his face, but because he has no feeling in his body he did not know where he received injuries; and
- c) Examination for discovery of Mr. Sidhu, the plaintiff's father, on August 22, 2012 - he stated that his son seemed "more scared" after the Second Accident, his son's "joints were clicking more" although he was unsure it was from the First or Second Accident, his son had more of a sleeping problem and he needed to take two melatonin tablets at one time rather than two hours apart.

[23] The plaintiff was extensively investigated regarding his injuries and care needs. The expert reports of Dr. Harpreet Kaler, the plaintiff's general practitioner, and Dr. Paul Winston, psychiatrist, made no reference to the Second Accident.

[24] The expert report of Dr. Rajiv N. Reebye, a psychiatrist retained by the plaintiff, is the only medical report that attributes any possible effect on the plaintiff's condition to the Second Accident. In his report dated November 1, 2018, he makes the following comment at page 11:

He also sustained nerve pain symptoms in his upper shoulder region as a result of the motor vehicle accident of March 30, 2008, and likely amplification of his pain symptoms as a result of the April 15, 2011 motor vehicle accident.

[25] Dr. Reebye further opines that the accident on March 30, 2008 directly caused the plaintiff to sustain life-altering changes.

[26] The Vivier defendants submit that there are no documented complaints of amplified pain symptoms following the Second Accident, neither in Dr. Reebye's expert file notes, nor in his clinical records.

[27] The Vivier defendants submit that the only expert psychiatric opinion served is a report of Dr. Derryck Smith dated September 7, 2018, in which he is asked to opine on the "psychiatric and psychological sequelae of the motor vehicle accidents of March 30, 2008, and April 15, 2011", but does not attribute any psychiatric injury to the Second Accident. I do note that this submissions is not accurate as, according to the information I have been provided, there are five expert reports from Dr. Smith served.

[28] The last report of Dr. Smith served is a follow-up report dated January 30, 2020, which makes no reference to injury attributed to the Second Accident.

[29] The plaintiff's expert, Barbara Baptiste, a life care planner and registered rehabilitation professional, was asked to consider the cost of care arising from both accidents. In her June 18, 2012 report at pages 13-14, she states:

18. On April 15, 2011, I understand that Arshdeep was involved in a rear end collision. His mother took him to the ER at Abbotsford Regional Hospital on the same day. Records indicate he was seen by a Dr. Shaw. Dr. Shaw noted the physical exam was unrevealing. He

was discharged that day. OT, Chin, thought that the MVC may have resulted in feelings of anxiety, as he was "trapped" for what I understand to be a few hours (due to his immobility and rear entrance/exit of the Grand Caravan modified van). Overall, I am not aware of any relevant sequelae from this MVC.

25. The functional deficits and medical problems outlined above are understood to be directly the result of the MVC of March 30, 2008. The MVC of April 15, 2011 is not considered to be a relevant factor with regards to his current and future needs.
- [30] In an updated opinion dated October 5, 2018, Ms. Baptiste makes the same references at paras. 25 and 32 on page 8.
- [31] The plaintiff's expert, Christine Farrell, an occupational therapist, was asked to provide a Future Care Analysis. She writes in her report dated October 31, 2019, at page 8:
10. Mr. Sidhu was involved in a second MVC on April 15, 2011, in which his vehicle was struck from the rear. He was examined in the ER at the Abbotsford Regional Hospital and returned home the same day. He experienced significant anxiety due to feeling trapped as it took an extended amount of time to extricate him from the vehicle. No substantial injuries were identified, and he does not appear to have experienced lasting sequelae from this incident.
- [32] The Vivier defendants have estimated in their trial brief a total of 3.6 hours needed for their defence. They submit that the trial in the Vivier Action, if severed, would take two days, or at the most three days, of trial.

Legal Principles

- [33] Rule 22-5(6) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules") provides:

Separation

- (6) If a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings or make any other order it considers will further the object of these Supreme Court Civil Rules.
- [34] Whether to sever proceedings is a discretionary decision made in the context of the court managing its own process: *Johnston Estate v. Johnston*, 2017 BCCA 59 at para. 41. The following factors to consider on an application for severance were set out in *O'Mara v. Son*, 2007 BCSC 871 at para. 23, endorsed by the Court of Appeal in *Johnston Estate* at para. 46:
1. whether the order sought will create a saving in pre-trial procedures;
 2. whether there will be a real reduction in the number of trial days taken up by the trial being heard at the same trial;

3. whether a party may be seriously inconvenienced by being required to attend a trial in which the party may have a marginal interest;
 4. whether there will be a real saving in expert's time and witness fees;
 5. whether one of the actions is at a more advanced stage than the other;
 6. whether the order sought will result in delay of the trial of any one of the actions and, if so, whether any prejudice which a party might suffer as a result of that delay outweighs the potential benefits which a consolidated trial might otherwise have;
 7. the possibility of inconsistent findings and common issues resulting from separate trials.
- [35] The judicial discretion to sever trials should be exercised sparingly, but it is also important to note that the assessment depends on the nature of the case at hand. As the determination involves an individualized assessment of the case at bar, there is no closed list of uniformly applied considerations that inform the exercise of the court's discretion: *Johnston Estate* at para. 46.

Analysis

- [36] In my view, the third consideration for severance set out in *O'Mara* is the most significant one applicable to the circumstances of these two Actions. If the Actions are not severed, the Vivier defendants will be required to attend a 73-day trial, the vast majority of which will focus on issues relating to the liability of the defendants in the Consolidated Action. Most of that trial will be of no concern to the Vivier defendants.
- [37] I agree with the Vivier defendants' submissions that the contentious damages issues at the trial in the Consolidated Action focus on the plaintiff's future loss of income, future care costs, and life expectancy. None of these issues are impacted by the injuries, if any, the plaintiff suffered in the Second Accident.
- [38] This plaintiff has been exhaustively examined and assessed by experts in the fields of paediatrics, general medicine, urology, physiatry, future care costs, and life expectancy. I see nothing in the expert evidence I have reviewed to date, that would indicate that the injuries in the Second Accident played any role on the damages issues to be assessed at the trial in the Consolidated Action.
- [39] The Nissan defendants seek to be able to argue that the plaintiff's injuries were caused or contributed to by "incidents subsequent to the Collision, including but not limited to a motor vehicle accident which occurred on or about April 15, 2011", as set out at para. 7 of Part 3 of Nissan's response to amended notice of civil claim in the Consolidated Action.
- [40] At this stage, being almost nine years after the Second Accident, and after the service of approximately 34 reports in the Consolidated Action from medical professionals commenting on the plaintiff's injuries and permanent disabilities, there is no evidence that supports the injuries in the Second Accident have caused or contributed to any ongoing loss

to the plaintiff. At most on the evidence referenced in this application, the plaintiff may have suffered from some increased anxiety while trapped in the van on April 15, 2011 and potentially some sleeping issues.

- [41] I note that Nissan does not submit their medical experts have opined that the plaintiff suffered any injuries in the Second Accident.
- [42] Severing the Vivier trial will remove two sets of counsel from the trial in the Consolidated Action, since the parent defendants are represented by different counsel in the Consolidated Action. This will be beneficial to the overall management of the trial in the Consolidated Action and be a substantial costs savings to the defendants in the Vivier Action.
- [43] With the knowledge I have of these actions, I will be able to decide which injuries were caused to the plaintiff in the First Accident and which injuries, if any, were caused in the Second Accident. The defendants in each accident will only be found liable for the injuries they caused.
- [44] In my view, a severance of the Vivier Action will help to achieve the overarching objective of the Rules, being a just, speedy, and inexpensive determination of every proceedings on its merit: R. 1-3.
- [45] I am not concerned that there is any possibility of inconsistent findings as between the Consolidated Action and the Vivier Action. I will be the trial judge at both actions should they both proceed to trial. The plaintiff argues in his application response that there is a risk of significant prejudice if the Vivier Action is not tried with the Consolidated Action, but a trier of fact nonetheless apportions liability to the defendants in the Vivier Action. The plaintiff can be assured that, as the trial judge in both actions, this risk will not materialize and that hypothetical scenario will not turn into a reality.
- [46] In my view, there are compelling reasons to order that the Vivier Action be heard separately from the Consolidated Action and the Other Actions that align with the principles governing R. 22-5(6), and I so order.
- [47] If counsel in the Vivier Action would like to have the trial set down and heard before the submissions in the Consolidated Action are heard, I can accommodate that. If the preference is to have the Vivier Action proceed to trial after the submissions in the Consolidated Action, but before judgment is pronounced, that can also be accommodated.
- [48] The Vivier defendants are entitled to their costs in the cause.

"Forth J."

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