

CANADA / JUDGMENT

Sperling v. Queen of Nanaimo

2020 BCSC 1852

COURT

Supreme Court of British Columbia

DECIDED

27 November 2020

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2020 BCSC 1852 Sperling v. Queen of Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sperling v. Queen of Nanaimo,

2020 BCSC 1852

Date: 20201127

Docket: S125455

Registry: Vancouver

Between:

Zdenka Sperling

Plaintiff

And

The Owners and all others interested in the Ship "Queen of Nanaimo", the "Queen of Nanaimo",
British Columbia Ferry Services Inc., John Doe 1, Prime Mover Controls Inc., ABC Company and
John Doe 2

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiff:

J. Kostyniuk

M. Crowe

Counsel for Defendants:

R. W. Grant, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

October 21-22, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 27, 2020

Introduction

[1] The plaintiff claims damages for personal injuries allegedly sustained when the Queen of Nanaimo, a ferry on which she was a passenger, collided with the dock at Mayne Island, B.C., on August 3, 2010. The plaintiff says that on impact, she was thrown from a chair aboard the ferry and struck her head on a pole.

[2] In addition to British Columbia Ferry Services Inc. ("BCF"), the owner and operator of the ferry, the present applicants, Ulstein Maritime Ltd. and Rolls Royce Canada Ltd. (the "Applicants"), are also named as defendants in this action. They are alleged to have been involved in:

the design, construction, installation, maintenance, service, inspection, refit and/or repairs of the operating systems, equipment and/or machinery of the Ferry, including but not limited to those relating to its propulsion, breaking and or steering systems.

[3] The Applicants seek a declaration that any liability they may have to the plaintiff is subject to a monetary limit of about \$325,000. That limit is contained in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, 1463 U.N.T.S. 19 (entered into force 28 April 1987) [Athens Convention], which is made part of Canadian law by the Marine Liability Act, S.C. 2001, c. 6, s. 37 [MLA].

[4] The limit in the Athens Convention applies to claims against "carriers" and their "servants or agents" (Article 7(1)). BCF did not appear on this application, but for present purposes, it is assumed to be a "carrier." The issue is whether the Applicants qualify as "agents" of BCF in order to gain the benefit of the monetary limit.

[5] This application is made under Rule 9-4 of the Supreme Court Civil Rules, which allows the court to rule on a point of law arising from the pleadings.

- [6] For the reasons that follow, I am not persuaded that the issue can be properly or appropriately answered under Rule 9-4, therefore the application is dismissed. Accordingly, these reasons are brief in order to avoid unnecessary comment on issues that will eventually have to be decided by the trial judge.

Legal Framework

- [7] Section 37 of the MLA gives the Athens Convention the force of law in Canada and extends its application to maritime transportation between places in Canada. Article 3(3) of the Athens Convention makes a carrier liable for the negligence of its servants or agents and says:

Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment shall be presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from or in connexion with the shipwreck, collision, stranding, explosion or fire, or defect in the ship

- [8] A passenger, such as the plaintiff, who claims damages resulting from a collision therefore benefits from a presumption of negligence, which the defendant has the onus of rebutting. This presumption reverses the onus of proof, which is normally on the plaintiff.
- [9] However, while giving a plaintiff passenger the benefit of a presumption of negligence, the Athens Convention also imposes a monetary limit on recoverable damages. Article 7(1) states in part:

The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 175,000 units of account per carriage

- [10] It is not necessary to go into the complexities of how "units of account" are defined and calculated under Article 7. Counsel agree that the limit is currently equivalent to approximately CDN \$325,000.
- [11] Article 11 extends the benefit of the monetary limit to servants or agents of a carrier acting within the scope of their employment. However, Article 13(1) removes that protection where it is proved that damage resulted from an act or omission "done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."
- [12] Rule 9-4, under which this application is brought reads:

Point of law may be set down for hearing

- (1) A point of law arising from the pleadings in an action may, by consent of the parties or by order of the court, be set down by requisition in Form 17 for hearing and disposed of at any time before the trial.

Court may dispose of whole action

- (2) If, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off or counterclaim, the court may dismiss the action or make any order it considers will further the object of these Supreme Court Civil Rules.
- [13] In this case, the matter is not set down by consent--the plaintiff opposes the application--but it is common ground that Rule 9-4 allows one party to apply for determination of an issue.
- [14] A decision on whether to determine an issue under Rule 9-4 is discretionary. The test for the use of that discretion is set out in *Alcan Smelters & Chemicals Ltd. v. C.A.S.A.W., Local 1* (1977), 3 B.C.L.R. 163 (S.C.) at 165:
1. The point of law to be decided must be raised and clearly defined in the pleadings;
 2. The rule is appropriate only to cases where, assuming allegations in a pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or a defence in law;
 3. The facts relating to the point of law must not be in dispute and the point of law must be capable of being resolved without hearing evidence;
 4. Whether a point of law ought to be decided before the trial of the action is discretionary, and it must appear that the determination of the question will be decisive of the litigation or a substantial issue raised in it; [and]
 5. In deciding whether the question is one which ought to be determined before trial the court will consider whether the effect of such a decision will immeasurably shorten the trial, or result in a substantial savings of costs.

[Citations omitted.]

- [15] The plaintiff's primary pleading is that the Applicants were not agents of BCF, but independent contractors or subcontractors. Agency is raised only in the further alternative.
- [16] Agency is normally defined as a fiduciary relationship in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or action: *Scott v. Davies*, 2010 BCSC 1479 at para. 30, citing *Black's Law Dictionary*, 8th ed., (St. Paul: Thomson West, 2004). The power to bind the principal is not necessarily part of the relationship between an employer and an independent contractor, who is engaged to perform specific work or services.
- [17] This being said, the Applicants say that common law definitions of and distinctions between servants (employees), agents, and independent contractors do not apply to the interpretation of international agreements such as the Athens Convention. Those agreements are meant to apply in multiple jurisdictions under many different legal systems. In *J.D. Irving, Ltd. v. Siemens Canada Ltd.*, 2016 FC 69 at para. 260, the Court said that in interpreting such

conventions it "should not be controlled by domestic precedents, but rather by broad principles of general acceptance".

- [18] The Applicants say that conventions similar to the Athens Convention, and international jurisprudence on them, has established a broader definition of agency. Under that broader definition, the Applicants say that an agent is anyone performing work for a carrier that the carrier would otherwise be required to perform itself. That definition can apply to an independent contractor, depending on what services the contractor performs.
- [19] According to the Applicants, the relevant distinction is between contractors who repair or maintain a vessel, including installing necessary equipment, and those who manufacture or modify a vessel or its components. The former are agents of the carrier, while the latter are not. The Applicants rely on the decision of the United States District Court, *In Re Air Crash Disaster Near Peggy's Cove, Nova Scotia* on September 2, 1998, MDL No. 1269, 2002 U.S. Dist. LEXIS 3308 (E.D. Pa.), for that argument. At issue in that case was a motion by the defendants to dismiss all claims for punitive damages on the ground that such claims are precluded by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929, C.T.S. 1941/15, 137 L.N.T.S. 11, commonly known as the Warsaw Convention.
- [20] The plaintiff does not agree that the extended definition of agency applies, and says common law definitions remain relevant. The plaintiff relies in part on *J.D. Irving, Ltd. v. Siemens Canada Ltd.*, 2016 FC 287--a subsequent decision to the Irving case referred to above. In the second Irving decision, involving a different convention and different liability limitation, Justice Strickland considered the questions of agency and vicarious liability with reference to Canadian authorities, and not international ones. In addition, Strickland J. said it is not clear that the policy considerations behind the limit of a ship owner's liability were intended to extend to independent contractors (at para. 33).

Analysis

- [21] Paragraph 4 of the legal basis in the NOCC reads:

The Defendants, and each of them, owed the Plaintiff a duty of care to ensure that where they were responsible, wholly or in part, for the design, construction, installation, maintenance, service, inspection, refit and/or repairs of the operating systems, equipment and/or machinery for the Ferry, including but not limited to those relating to its propulsion, breaking and/or steering systems, the work they did and/or supervised, was done properly and in accord with the prevailing professional standards.

- [22] Paragraph 6 alleges 22 particulars of negligence against BCF and para. 8 alleges 10 particulars of negligence against the Applicants. The particulars alleged against the Applicants effectively duplicate some of the particulars alleged against BCF, and in some cases identical language is used.

- [23] The Applicants argue that by alleging the same particulars of negligence against them as against BCF, the plaintiff has effectively admitted that they were doing work BCF would have otherwise have had to perform itself. The legal effect of that admission, they say, is to make them agents of BCF for the purposes of the Athens Convention.
- [24] The applicability of the Athens Convention is raised in general terms in the pleadings. The NOCC admits it applies to BCF and the master of the ferry, but specifically alleges it does not apply to the Applicants. However, I do not find the Applicants' purported definition of agency under the Athens Convention to be an issue that is specifically "raised and clearly defined in the pleadings" as required by Alcan.
- [25] The Applicants are not seeking to rely on an express legal or factual admission in the pleadings, but one they say should be inferred. In my view, it cannot be inferred that the NOCC was drafted with the intention of making any such admission.
- [26] The identical nature of the allegations against various defendants reflects the fact that, at the commencement of an action, a plaintiff does not yet know what acts or omissions may ultimately be found to have caused the accident or what acts or omissions fell within which defendant's area of responsibility.
- [27] Even on the definition of agency that the Applicants contend for, the allegations against them in the pleadings are not limited to matters falling within that definition. They include allegations related to design and construction as well as maintenance and repairs. And, even if the monetary limit might otherwise apply, the plaintiff seeks to use the exemption from it in Article 13(1) of the Athens Convention. (The NOCC includes, at para. 17 of the factual basis, an allegation that the conduct of all defendants was deliberate or reckless.)
- [28] I therefore find that the ruling the Applicants seek would likely not be decisive or shorten the trial. Extensive evidence of what work the Applicants performed and how they performed it will still be necessary.
- [29] I also find that the point of law raised is not one that can be resolved without hearing evidence. It will be for the trial judge to decide what the relationship was between the Applicants and BCF, what work the Applicants were engaged to perform, which of the Applicant's acts or omissions, if any, caused or contributed to the collision, and whether those acts or omissions were negligent, deliberate, or reckless. The Court will only be in a position to consider how the provisions of the Athens Convention are to be interpreted and applied when the necessary findings of fact have been made.
- [30] Having found that the issue cannot be determined under Rule 9-4, I do not need to deal with the plaintiff's submission that this application is *res judicata*, as a result of what was said by Justice Kent in a previous decision in this case. (That was a decision on an application to add the Applicants as defendants in this action, and is indexed at 2014 BCSC 326.)
- [31] The defendants' application under Rule 9-4 is dismissed, with costs in the cause.

"N. Smith, J."

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Prepared on 28 October 2026 · Esheria