

CANADA / JUDGMENT

Thomson v. British Columbia (Interior Health)

2020 BCSC 1591

COURT

Supreme Court of British Columbia

DECIDED

28 October 2020

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2020 BCSC 1591 Thomson v. British Columbia (Interior Health)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thomson v. British Columbia (Interior Health),

2020 BCSC 1591

Date: 20201028

Docket: 58631

Registry: Kamloops

Between:

Neil E. Thomson

Plaintiff

And

Her Majesty the Queen in the Right British Columbia,

Interior Health Authority, Royal Inland Hospital,

Kamloops Mental Health & Substance Abuse,

Dr. Kurt Buller and Dr. James Mabee

Defendants

Before: The Honourable Mr. Justice Dley

Corrected Judgment: The front page of the judgment

was corrected on October 30, 2020

Reasons for Judgment

Appearing on his own behalf:

N.E. Thomson

Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia:

L. F. de Lima

Counsel for the Defendants, Interior Health Authority:

A.C. Fraser

Counsel for the Defendants, Dr. Kurt Buller and Dr. James Mabee

D.C. Froese

Place and Date of Hearing:

Kamloops, B.C.

October 8, 2020

Place and Date of Judgment:

Kamloops, B.C.

October 28, 2020

Introduction

- [1] Mr. Thomson applies to have his claim tried on its merits. The defendants seek to have Mr. Thomson's claim dismissed on the basis of res judicata--cause estoppel and issue estoppel. Two of the defendants, Dr. Buller and Dr. Mabee, also apply to have Mr. Thomson declared a vexatious litigant.
- [2] Mr. Thomson previously filed a claim against these same defendants in 2016, based on the same facts. His claim was dismissed because it was barred by a limitation period: *N.T. v. British Columbia*, 2017 BCSC 1742 ("trial decision"), aff'd *N.E.T. v. British Columbia* (Attorney General), 2018 BCCA 380 ("appeal decision"), leave to appeal ref'd [2018] S.C.C.A. No. 537.
- [3] For the reasons set out below, I conclude that Mr. Thomson's claim must be dismissed. The application to have Mr. Thomson declared a vexatious litigant is also dismissed.

Background Facts

- [4] Mr. Thomson was previously admitted to the Royal Inland Hospital as an involuntary patient under the Mental Health Act, R.S.B.C. 1996 c. 288 [MHA] from 2000 to 2013. His claims against the defendants all arise out of his certification and admission under the MHA (see the trial decision at para. 2).
- [5] In 2012, Mr. Thomson first initiated legal proceedings by petitioning this court for a review of his detention and an expunging of his medical record. Meiklem J. summarized this in the trial decision at para 16:
- [16] On February 28, 2012, N.T. petitioned this court in action No.46901, Kamloops Registry, pursuant to ss. 33(2) and (8) of the MHA for an Order that he be discharged from RIH and he sought an ancillary Order for the expunging of all medical records associating him with a mental infirmity, together with an Order that Dr. Buller, as a representative of RIH, IHA and MHSU, write a letter stating that the petitioner was of sound mind and that assertions to the contrary were unfounded. Mr. Justice Greycliff's reasons dismissing the Petition, indexed as N.T. v. Facility, 2012 BCSC 1162, were released on August 2, 2012.
- [6] In 2016, Mr. Thomson commenced an action against these defendants. The facts and claims, as pleaded, were set out in the trial decision and include the following comments at paras. 3-5:
- [3] The plaintiff claims that Dr. Mabey and Dr. Buller were both negligent in their diagnosis and treatment of him, which consisted principally of prescribing the anti-psychotic medication Olanzapine, and enforcing his consumption of same by maintaining involuntary patient certification under the MHA. The plaintiff has consistently asserted that he does not suffer from any mental illness or infirmity. He faults these defendants for concluding that he was delusional without first investigating the veracity of his reported interventions in his life by various entities.
- [4] The Notice of Civil Claim refers to Dr. Buller and Dr. Mabey "holding", "fiduciary responsibility", as well as "duty of care responsibility". The claims against the Government of British Columbia, Interior Health Authority ("IHA"), RIH, and Kamloops Mental Health and Substance Use ("MHSU") are somewhat obscure. The claim against IHA, MHSU and RIH seems to be based on the proposition that they are vicariously liable for "permitting" injurious conduct on the part of "medical personnel". The relief sought against the Government of British Columbia is the expunging of records of "Medical Billing Services", and the plaintiff claims that the Government is jointly liable with the other institutional defendants for damages because it has failed to respond to his "requests for remedy", and because it "facilitates and abets faulty process in the form of the BC Mental Health Act's administration which wrongfully effected the plaintiff's detention and caused grievous and irreparable injury".

- [5] In his Notice of Civil Claim, the plaintiff sets out some alleged facts under the heading: "Facts Related to Dr. Buller's Miss-diagnosis and the Plaintiff's Initial Incarceration" which I will quote, as that will serve to describe the first interaction of the parties:
- 9) In and about 1998 at age 40, the Plaintiff reported to his family that he had become aware of synchronistic action on the part of others affecting the Plaintiff's life.
- 10) The Plaintiff determined that said actions were cause to reasonably fear for his health and wellbeing, with a reasonable assessment of risk including consequences as extreme as death.
- a. By way of example - Demi's, the practice of using food as a delivery system for pharmaceuticals or illicit substances exposed the Plaintiff to the risk of contra indications, as the Plaintiff received substances and had no information as to what they were. This is reasonable cause to fear for one's health, and reasonably one's life.
- 11) The Plaintiff, in the absence of information as to who was responsible, explained experiences to friends and family - all denied knowledge.
- 12) The Plaintiff approached the RCMP who, to the Plaintiffs knowledge, failed to respond.
- 13) The Plaintiff reluctantly agreed to a medical exam to put his family at ease with events.
- 14) Dr. K. Buller chose to interpret the assertions made by the Plaintiff regarding synchronistic action as infirmity.
- 15) Dr. K. Buller incarcerated the Plaintiff never having engaged any government authority or other resource to investigate, to refute or substantiate the Plaintiff's claims.
- [7] Mr. Thomson says that this action is different than his 2016 action because he has new evidence. He also says that his protections under the Charter of Rights and Freedoms were breached and those were not addressed in the earlier action. Mr. Thomson says that he is not interested in a monetary remedy; rather, he seeks to expose the MHA as an unlawful intrusion into his rights to be free from arbitrary detention and as protected by the Charter. The notice of civil claim in this action is in many respects a mirror of the 2016 action.
- [8] Meiklem J. concluded that the basic limitation period commenced on October 4, 2012; the Claim was filed on July 12, 2016. The court could not find any reason to postpone the commencement of the two-year limitation period and dismissed Mr. Thomson's claim as statute barred.
- [9] In dismissing the appeal, Fenlon, J.A. said the following:
- [28] In my view, the potential for apprehension under a statute which authorizes involuntary treatment of persons meeting certain criteria, and which applies to everyone in the Province, cannot constitute an assault. Nor does the actual apprehension and detention of a person in accordance with the certification provisions of the Mental Health Act, without more, amount to intentional infliction of unlawful force. The purpose of the Act is, in part,

to provide treatment for those who are incapable of recognizing the need for it and who will not accept it voluntarily -- de facto they can only be hospitalized against their will. In this case there is no suggestion that the formalities of the Mental Health Act were not complied with in relation to the appellant's certification or treatment. I note parenthetically that each certification was reviewed and upheld by the Mental Health Review Panel, and that the fourth certification was also reviewed and upheld by the Supreme Court of British Columbia.

- [10] Mr. Thomson says that the new evidence consists of reports from the Ombudsperson (Special Report No. 42 - "Committed to Change: Protecting the Rights of Involuntary Patients under the Mental Health Act," March 2019) and the Community Legal Assistance Society ("Operating in Darkness," November 2017) which set out the issues of treatment and rights facing detainees under the MHA.

New Evidence

- [11] Mr. Thomson relies on *Varco Canada Limited v. Pason Systems Corp.*, 2011 FC 467 at paras. 15-21, where the defendants sought to reopen the trial to admit new evidence. The court commented that there is a discretion to reopen, but it is to be used sparingly, cautiously, and only in exceptional circumstances:
- [15] The first point and an overarching aspect is that reopening is a matter of broad discretion but one which should be exercised sparingly and cautiously. Finality of a trial is a critical concept in our justice system - no one appreciates that concept more than a trial judge who is faced with the generally unpleasant task of reopening a case on which he or she has commenced writing.
- [16] While the discretion is broad, there are some factors which should be considered. The decision in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983 has set out the questions a court should consider:
1. Would the evidence, if presented at trial, have changed the result?
 2. Could the evidence have been obtained before trial by the exercise of reasonable diligence?
- [17] The *Sagaz* decision is not strictly applicable here because it dealt with a motion to reopen after judgment had been rendered. On the first test the situation is quite different where the Court has not yet reached its final conclusion. In the current situation it is more appropriate to ask - could the evidence, if it had been presented, have had any influence on the result? This engages an inquiry as to materiality/relevance.
- [18] The second branch of the *Sagaz* test can be more easily imported into the situation of new evidence before decision where it is a factor for consideration but not necessarily determinative of the issue.

[19] The judicial policy captured by the two-prong test is well described in *Risorto v State Farm Mutual Automobile Insurance Co.*, (2009), 70 CPC (6th) 390 (Ont. Div. Ct.), in paragraphs 34-36:

34 The principles applied by the Supreme Court of Canada in *Sagaz*, *supra*, are not new. [] The moving party must satisfy the Court that the proposed evidence would probably change the result, and that it could not have been discovered by the exercise of due diligence.

35 The policy reasons for the adoption of the two-pronged test are well-known, and have been discussed in a number of the cases to which I have referred. An orderly system of litigation requires that each party put his or her best foot forward. It contemplates that judgment will be rendered after each party has done so. Litigation by instalments is not to be encouraged. There is a strong interest in finality, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions. At para. 14 of her judgment in *DeGroote*, *supra*, Lax J. quoted with approval the following statement by Wilkins J. in *Strategic Resources International Inc. v. Cimetrix Solutions Inc.* (1997), 1997 CanLII 12168 (ON SC), 34 O.R. (3d) 416, at p. 421:

After the trial is complete and judgment is rendered, it is always a simple matter, utilizing hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of being a loser.

36 In the same paragraph, Lax J. noted the observation of the Court of Appeal in *Becker Milk*, *supra*, at p. 556, that "An unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he was content to have the trial judge bring forward his judgment based on the record produced at a trial in which that litigant actively participated..[]

[12] The comments in the Ombudsperson's Report and in "Operating in Darkness" may confirm what Mr. Thomson already knew when he filed his first claim. The trial judge reviewed the circumstances of persons detained under the MHA in his analysis of whether the limitation period should be postponed. That analysis touched on the concerns now proposed by Mr. Thomson as being new evidence. It serves no useful purpose to repeat what has already been said in the trial decision and as upheld on appeal.

[13] New evidence discovered after trial must be practically conclusive of the matter: *Varette v. Sainsbury*, [1928] SCR 72 at p. 76. The phrase "practically conclusive" has been taken to mean that the new evidence "entirely changes the aspect of the case": *Guardian Insurance Co. of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62 at para. 90, leave to appeal ref'd [2014] S.C.C.A. No.3.

[14] It cannot be said the proposed new evidence entirely changes the case. The nature of the new evidence was already considered in the trial decision and on appeal. I therefore conclude that the new evidence would not be practically conclusive and so does not justify reopening an issue that has already been decided.

Res Judicata

- [15] The doctrine of res judicata operates to prevent a party from relitigating the same cause of action and was succinctly summarized in *Erschbamer v. Wallster*, 2013 BCCA 76 at paras. 12-15 :
- [12] The general principles of the doctrine of res judicata were reviewed by this Court relatively recently in *Cliffs Over Maple Bay*. The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.
- [13] In *Cliffs Over Maple Bay*, Madam Justice Newbury set out the requirements of issue estoppel at para. 31 (from *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at 935, as quoted with approval in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254):
- (1) that the same question has been decided;
 - (2) that the judicial decision which is said to create the estoppel was final; and,
 - (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies....
- [14] With respect to cause of action estoppel, Newbury J.A. quoted, at para. 13, from the seminal case of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 at 319 (Ch.):

In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

She noted, at para. 14, that this language has been somewhat narrowed by the decision in *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321, where Mr. Justice Cromwell stated that the doctrine should apply to "issues which the parties had the opportunity to raise and, in all the circumstances, should have raised" (para. 37).

[15] Madam Justice Newbury set out the requirements of cause of action estoppel at para. 28 (from *Grandview v. Doering*, [1976] 2 S.C.R. 621, as summarized in *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, *aff'd* (1987), 45 D.L.R. (4th) 766 (Man. C.A.)):

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
2. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action [the requirement of "mutuality"];
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[16] In determining whether estoppel applies, I have considered the pleadings and the reasons in the trial and appeal decisions.

[17] I conclude that issue estoppel applies in these circumstances. Mr. Thomson must show that he has brought his claim within the allowable limitation period before this action can proceed. The prior action considered this issue and held that the action was statute barred. I therefore find:

- a) The same question (i.e. whether the action can be brought) has already been decided;
- b) The decision in the prior action was final; and
- c) The parties in both action are the same.

[18] I also conclude that cause of action estoppel applies because:

- a) The trial decision, as affirmed on appeal, was final;
- b) The parties to this litigation are the same as those in the prior action;
- c) The cause of action was the same, i.e. Mr. Thomson being detained under the MHA; and
- d) All matters as argued here (including references to the Charter) were argued or could have been argued in the prior action.

[19] The result is that this action must be dismissed under the doctrine of *res judicata*.

Vexatious Litigant

[20] Dr. Buller and Dr. Mabee apply to have Mr. Thomson declared a vexatious litigant pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996 c. 443. The applicants must show:

- a) that the proceedings were taken in the absence of objectively reasonable grounds; and
- b) that proceedings have been brought "habitually or persistently, such that the litigant has continued obstinately in the course of conduct, despite protests or criticism":

Holland v. Marshall, 2010 BCSC 1560 at para. 7.

[21] In *Johar v. College of Veterinarians of British Columbia*, 2020 BCSC 1085 at para. 276, Harvey, J. adopted the approach in *Re Lang Michener and Fabian* (1987), 59 O.R. (2d) 353 (Ont. H.C.) summarizing the factors to be considered in assessing whether proceedings are vexatious:

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[22] At first blush, it may appear that Mr. Thomson has instituted vexatious proceedings. His claim in this action has been dismissed on the basis of *res judicata*. However, a dismissal of an action does not necessarily mean that litigants who have their claims dismissed on the basis of estoppel are vexatious litigants. All of the factors must be looked at, together with the second part of the test, which is whether Mr. Thomson has committed a deliberate repetition or continuation of vexatious conduct: *Johar* at para. 275.

[23] Mr. Thomson is unhappy that his claim was not heard on its merits; his position is understandable. Mr. Thomson is passionate about his concerns for persons suffering from mental illnesses. He has spent considerable time and effort to highlight his social interests. He has put forward his position carefully, thoughtfully and articulately. Mr. Thomson was of the view that new evidence would cause the court to hear this action.

[24] In these circumstances, Mr. Thomson's assessment of his case was incorrect. However, it does not have the markings of repeated actions brought for an improper purpose. It cannot be labelled as habitual or persistent yet.

[25] I, therefore, dismiss the application to have Mr. Thomson declared a vexatious litigant.

Costs

[26] In the ordinary course of events, a successful party is entitled to costs. There is no reason to depart from that principle even though Mr. Thomson says he has no way of satisfying such an award. Costs are one way of ensuring that unsuccessful litigants understand that there is a risk to bringing an action. An indigent litigant ought not to assume that he or she is immune to cost consequences.

[27] Under Rule 14-1(15) of the Supreme Court Civil Rules, the court may award lump sum costs. Interior Health and the Province of British Columbia submit that lump sum costs of \$1,000 be awarded. The other defendants had divided success and I conclude they are not entitled to costs.

[28] In light of the voluminous amount of material to be considered and the nature of the arguments, I conclude that the lump sum award as proposed is more than reasonable.

[29] Accordingly, I award Interior Health and the Province of British Columbia each lump sum costs of \$1,000, all inclusive.

Summary

[30] This action is dismissed with Interior Health and the Province of British Columbia each awarded lump sum costs of \$1,000 respectively. The application to have Mr. Thomson declared a vexatious litigant is dismissed.

[31] As a result of the dismissal of the action, there is no need to decide upon Mr. Thomson's application for document disclosure.

"S.D. Dley J."

DLEY J.

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Prepared on 26 October 2026 · Esheria