
CANADA / JUDGMENT

Wyman v. Fammarz S.R.L.

2009 BCSC 990

COURT

Supreme Court of British Columbia

DECIDED

22 July 2009

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2009 BCSC 990 Wyman v. Fammarz S.R.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wyman v. Fammarz S.R.L.,

2009 BCSC 990

Date: 20090722

Docket: S091686

Registry: Vancouver

Between:

Jesse Lee Wyman, an infant by his Litigation Guardian,

Theresa Anne Wyman

Plaintiff

And

Fammarz S.R.L. formerly known as Marzocchi S.P.A.,

and others

Defendants

Before: Master Baker

Reasons for Judgment

Counsel for Plaintiff:

R. Mogerman

Counsel for Defendants:

V.J. Pahl and K.F. Gourlay

Place and Date of Hearing:

Vancouver, B.C.

July 6th, 2009

Place and Date of Judgment:

Vancouver, B.C.

July 22, 2009

ISSUE

[1] The defendants[1] apply under Rule 19 to strike parts of the plaintiff's statement of claim.

BACKGROUND

[2] On December 6th, 2006 the plaintiff Mr. Wyman was injured while riding a mountain bike. He alleges that his injuries were caused in whole or in part by negligence in the design and/or manufacture by the defendants of the bike's front fork and shock assembly, known as a "Z1 Bomber". Alternatively, he claims that the defendants are strictly liable for the fork and shock design or that they are answerable in product liability. Finally, Mr. Wyman claims punitive damages in addition to general and special damages.

[3] The impugned pleadings are:

Para. 13: As Jesse rode over the mound, the Z1 Bomber shattered, launching Jesse over the handle bars...

(impugned words emphasized)

Para. 17: So far as the Plaintiff is presently aware, the Defendant Marzocchi Italy had been established in the business of manufacturing suspension components for high performance motorcycles when it was approached by Martin in the early 1990's (sic) with a proposal to design suspension systems for mountain bikes. As a result, Marzocchi S.P.A. formed Marzocchi U.S.A. in Valencia, California, and appointed Martin president.

Para. 20: The Z1 Bomber was developed, designed and marketed by Martin, Marzocchi U.S.A. and Marzocchi Italy as a Freeride shock. According to the promotional material produced by Martin, Marzocchi U.S.A. and Marzocchi Italy, Freeride 'is for skilled riders and involves aggressive slopes, large obstacles and moderate jumps'.

Para. 23: In or about 2002, Martin was specifically warned by Robin Brown, P.Eng., a professional engineer in British Columbia, that the Z1 series was defective and was prone to premature fatigue failure.

Para. 24: Sometime prior to June 4, 2003, Louie Anthony Hernandez ("Hernandez") was seriously injured when the stanchions of the Marzocchi Z1 front shocks of his mountain bike failed. Hernandez brought suit against Marzocchi U.S.A. and Marzocchi Italy in the Superior Court of California alleging that the Z1 shocks were defective. So far as the Plaintiff is presently aware, Hernandez produced to Marzocchi U.S.A. and Marzocchi Italy, engineering evidence in the course of that litigation which confirmed the defective nature of the Z1 shocks.

Para. 25: In addition to a number of actions commenced in British Columbia, the following actions were also brought against Marzocchi U.S.A. and/or Marzocchi Italy as a result of failure of the Marzocchi Z1 series shocks

(10 separate American court actions are then listed)

Para. 26: As a result of the information provided by Robin Brown, the Hernandez, Crowne, and Aguirre actions and other similar lawsuits, incidents and complaints, Martin Marzocchi U.S.A. and Marzocchi Italy knew before the subject accident that the Z1 Bomber series was defective, prone to catastrophic failure in use and posed a significant risk of causing severe personal injury. Despite this knowledge, Martin, Marzocchi U.S.A. and Marzocchi Italy failed to recall the Z1 Bomber series including the subject Z1 Bomber and failed to embark on a campaign to ensure that users were specifically warned of the risk of premature failure. Instead, Marzocchi U.S.A. posted this notice on its website for a period of time:

(a notice followed, offering upgrading of certain year models of forks, including the Z1)

PARTIES' POSITIONS

[4] The defendants argue that these pleadings offend Rule 19(1):

- (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

More particularly, they argue that much, if not all, of the impugned pleadings do not constitute material facts, but rather the evidence that will prove those facts. The pleadings in that respect fail the test expressed by the authors of *Conduct of Civil Litigation* in B.C.[2]:

Facts which are not necessary to establish either a cause of action or the defence to it are not, speaking generally, 'material'...and should, therefore, be omitted from the pleading. All statements which need not be proved should be omitted.

And

A question which is often useful to ask in order to distinguish material fact and evidence is: Would the admission of this allegation by the opposite party help to establish the case?

- [5] In the case of para. 13, above, the plaintiff argues that the highlighted words ("shattered" and "launching") are too colourful, to the extent that they serve a purpose or purposes other than to inform the defendants of the case to meet. They are, say the defendants, scandalous.
- [6] The plaintiff submits that he has pleaded a claim for punitive damages and bases his claims on strict liability and product liability as alternatives to negligence. As such, he argues that not only are the challenged pleadings permissible, but that they are required.

ANALYSIS

- [7] Were this a "typical" negligence case (if such exists), I would agree entirely with defence counsel, and would strike a good deal of the impugned pleadings. What is key to the analysis, however, is that the plaintiff pleads product liability/strict liability and punitive damages. As a consequence I agree with Mr. Mogerman's submissions that, firstly, the substance of the pleadings in question is not evidence per se, but is fact, and that exceptional detail in pleading is required.
- [8] Beginning with product liability, I take the law in British Columbia to be as expressed by Lowry J. In *G.W.L. Properties Ltd. V. W#.R. Grace & Co. of Canada*[3], a case turning on allegations of liability for the use of building insulation and fire retardant materials containing asbestos. The defence alleged that the plaintiff and other agencies (eg. WCB) knew, or should have known, the nature of, or problems associated with, asbestos, and of alternatives to its use. Broadly speaking Lowry J. considered how generally or how specifically the defendant was required to plead the means of that knowledge. Not surprisingly, Lowry J.'s analysis turned on the nature of the claim itself and the fact that product liability was in question. After concluding that greater specificity and detail was required in the statement of defence, he said:[4]

It is time for Grace to particularize the facts material to establishing the owners' knowledge of the product and the alternatives available with which the parties and the court will be concerned at the trial. In my view, the need for particulars in this regard will be met by Grace stating the following facts to the extent that such are to be proven at trial:

- (a) the specific advice that was given, the dates, the persons involved and in what capacity they were employed;
- (b) the titles, the source, and the dates of the published material;
- (c) the possible effects on human health and the certain circumstances that were the subject of the publicity and the common knowledge that existed at all material times; and
- (d) the projects that were the source of publicity concerning the use of asbestos-free products and the content of the publicity associated with each.

By the same token the owners are also entitled to a statement of the following:

- (e) when and where the WCB inspections and testing were undertaken when Grace's product containing asbestos was being applied; and
- (f) when and where the WCB conferences, seminars, and courses were organized and what and when publications, notices, and other materials were distributed which included discussion of the possible health effects of asbestos fibres.

[9] On the distinction between facts and evidence, Lowry J. said:[5]

They do not seek the evidence by which the facts will be proven. For example, the owners are faced with a broad allegation that they knew the nature of the insulation and the existence of alternatives because they, or their predecessor companies, were given advice to that effect some time during the last 30 years or more. They seek the facts Grace must prove: what the advice was and when and by whom the advice was given, and, for that matter, by whom it was received. They do not seek the evidence by which those facts will be proven: the testimony to be given by the persons who gave the advice or the persons who received it or other persons who may have heard the advice being given, i.e., the mode of proof.

(emphasis added)

- [10] With respect, the case before me presents a similar issue i.e. the defendants are faced with an allegation of knowledge respecting their product, and it is not only advisable but required that the plaintiff plead sufficient detail for that allegation.
- [11] Paragraph 20 describes the purpose for which this product was developed and sold; that purpose and the defendants' knowledge of the purpose are material.
- [12] In cases of product liability there may be imposed upon a defendant a duty to warn; whether or not that duty has been met obviously turns on the terms of the notice itself. For that reason paragraph 26 of the statement of claim is acceptable in the terms pleaded.
- [13] Both counsel acknowledged that it is perhaps novel to plead a claim of strict liability in the context of this case. It is arguable, however, that there is a relationship between product liability and strict liability.[6] It is possible that there is an emerging development of strict liability law in Canada i.e. liability for abnormally dangerous activities. This principle allows for abnormally risky or "extra-hazardous" activities, and provides for strict liability for parties that profit by that activity and, possibly, imposes a higher duty on such parties. Without attempting to define or circumscribe the factors that the plaintiff might have to prove to establish liability of this nature, it is clear to me that he would have to show the inherently hazardous nature of the activity, the defendants' knowledge of the activity and its hazards, the suitability of their product for such activity, and any knowledge they had of inadequacy, defect, or insufficiency in their product. The impugned pleadings do that: they allege specific and detailed knowledge of the defects.

- [14] Knowledge is obviously a factor in the consideration of punitive damages. It does not assist to simply plead that a defendants' conduct has been "high handed, arbitrary, oppressive, deliberate, evil, outrageous, disgraceful, wanton", or the like. Such terms are adjectival in nature and, in the end, unhelpful in describing a type of behaviour that is particularly worthy of censure. Proof that a defendant has acted throughout in good faith can be a defence to a claim for punitive damages; the defendants' knowledge is therefore important and the means of that knowledge is material.
- [15] It is one thing to have, for example, vague intimations or reports of product problems, but it is entirely another to be cautioned by an expert in the field (such as, allegedly, Robin Brown, a professional engineer: viz. para. 3, above). In the same vein, Aristotle was right: one swallow does not make a summer, but surely an entire flock of sparrows would suggest that we're well into late spring. Any product, it would seem, could attract a lawsuit, but a possible pattern, such as that suggested by para. 25 of the statement of claim (para. 3 above) should put a party on notice.
- [16] Paragraphs 20 and 23 - 26 do not, therefore, offend Rule 19. The exception is para. 17; in my view it simply sets out history and background to the defendants undertaking the design and manufacture of the bike forks. Most of it is not material and fails the test as set out by Conduct of Civil Litigation in B.C. It will be struck in its present form, with liberty to amend.
- [17] Paragraph 13 of the claim is challenged for different reasons; it is argued that the words "shattered" and "launching" are colourful. In other words, the defendants submit that the words are intended to convey more than just their simple meaning, and to imply more, to the extent that they are, in terms of Rule 19(24), scandalous or, perhaps, prejudicial.
- [18] In *George v. Harris*[7] Epstein J. of the Superior Court of Justice struck certain portions of the claim:

32 The heading which reads "Deliberateness of Documentary Disclosure Evasions by the Defendant Harris" is clearly inserted for colour. It is also objectionable as being evidence unsupported by the record and protected from any challenge other than by way of the relief sought in this motion. It is struck.

As I read *George*, and while the terms are certainly not used interchangeably, surrounding pleadings were struck for the use of innuendo, argument, conclusions, and "inflammatory" language. I say this to make the point that pleadings are not restricted to the dull greys of formulaic prose. A little poetry or colour is not necessarily a bad thing. The question is: do the phrases used take such liberties that they go beyond informing the other party, to the extent of becoming inflammatory or prejudicial? In this case I think not. I take "shattered" to be reasonably synonymous with "broke", or "failed" and unlikely to mislead a fact-finder. Similarly, while "launching" may be, as the defendants argue, more colourful than "propelling", or "throwing", it does not offend.

- [19] With the exception of para. 17 of the claim, the defendants' application is therefore dismissed. In the circumstances the plaintiff is substantially successful and is entitled to his costs.

Master D. Baker

- [1] Easton Sports Inc. ("Easton") did not participate in this application, so that any reference to "defendants" will include only the remaining defendants.
- [2] Markham: Butterworth's 2007 2nd ed. Vol 1 at para. 11.2 citing Odgers on Pleading and Practise, 1st ed.
- [3] (1993) 79 B.C.L.R. (2d) 126
- [4] Ibid. at p. 134
- [5] Ibid
- [6] Canadian Tort Law (Linden) 8th ed. LexisNexis Butterworths at 622 where the authors marvel at the fact that the propensity of American courts to apply strict liability principles to consumer goods has not crossed the border into Canada.
- [7] (2000) O.J. No. 1762 at para. 32

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Prepared on 29 October 2026 · Esheria