

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gibson v. ICBC*,
2010 BCSC 1097

Date: 20100804
Docket: S032715
Registry: Vancouver

Between:

Peter Robert Gibson

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: Master Donaldson

Corrected Judgment: Name(s) of Counsel for the Plaintiff were corrected

Reasons for Judgment

Counsel for the Plaintiff:

R. B. McNeney
J. D. Barnes

Counsel for the Defendant:

F.G. Potts

Place and Date of Hearing:

Vancouver, B.C.
July 26, 2010

Place and Date of Judgment:

Vancouver, B.C.
August 4, 2010

[1] This action arises from a motor vehicle accident which occurred on or about the 24th of May 2002 which was described by the plaintiff, Mr. Gibson, as being a hit and run accident.

[2] The claim is brought pursuant to s. 24(1) of the *Insurance (Motor Vehicle) Act* R.S.B.C. 1996. In the original statement of defence, the defendant, Insurance Corporation of British Columbia ("ICBC"), in paragraph 2, stated the following:

In answer to the whole of the Statement of Claim, the Defendant says that the identity of the driver and/or owner was ascertainable, and no cause of action arises pursuant to s. 24(1) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 and amendments thereto.

[3] On or about the 18th of January 2007 a representative of ICBC forwarded a letter to counsel for the

plaintiff indicating that it would admit liability and at the trial held the 26th of February – 2nd of March 2007 counsel on behalf of the defendant again stated that ICBC would admit liability.

[4] On the 8th of March 2007 oral reasons for judgment were given by Mr. Justice Romilly and by the 17th of April 2007 that decision had been appealed (April 3rd, 2007) and cross-appealed.

[5] On or about the 10th of May 2007 an anonymous tip was given over the “ICBC tip line” indicating that the accident stated by Mr. Gibson to have been a hit and run had been falsely reported.

[6] On the 13th of December 2007 ICBC brought an application before Mr. Justice Romilly to re-open the trial based upon information received on the tip line.

[7] On the 20th of December 2007 Mr. Justice Romilly dismissed the application brought by ICBC to re-open the trial and to withdraw the admissions.

[8] On the 20th of May 2008 the Court of Appeal rendered judgment concluding that there should be a new trial. At paragraph 37 the Court of Appeal dealt with the portion of ICBC’s appeal which dealt with its appeal from the decision of the trial judge of refusing to re-open the trial:

For these reasons there must be a new trial in this matter. That disposition renders moot ICBC’s appeal from the trial judge’s order refusing to re-open the trial.

[9] On the 27th of November 2007 the plaintiff in this matter, Peter Gibson and Zoltan Sandli, the person sought to be added as a defendant by counterclaim were charged pursuant to s.42.1 of the *Insurance (Motor Vehicle) Act* for mischief.

[10] A stay was later entered in relation to that matter.

[11] On or about the 3rd of March 2010 a letter from counsel for the defendant to counsel for the plaintiff confirmed that ICBC did not admit that the names of both the owner and driver of the vehicle which they contend struck Mr. Gibson were not ascertainable and did not admit that the driver of the other vehicle was at fault. On or about the 8th of June 2010 counsel on behalf of ICBC served the three notices of motion dealt with at this hearing on plaintiff’s counsel.

[12] In applications before me, ICBC seeks to add Zoltan Sandli as a defendant to the proceedings by counterclaim, seeks to amend its statement of defence, and seeks to file a counterclaim.

[13] The amendments sought to the statement of defence include the contention that the plaintiff knew or had the means of knowledge to know that the driver who struck him was one Heather Sawicki.

[14] The counterclaim is much more significant in that it sets out the contention the plaintiff knew the identity of the driver of the vehicle that struck him and together with Mr. Sandli made fraudulent insurance claims against ICBC resulting in significant loss to ICBC.

[15] Flowing from the application to amend the pleadings ICBC applies for an order that the issue of liability

and damages be severed and the application that the plaintiff be further discovered.

[16] Application is brought on behalf of the plaintiff for an order that Doug Smith being a “special provincial constable with the Insurance Corporation of British Columbia special investigations unit” be examined on his affidavit filed in this matter.

[17] It should be noted that notice of trial was taken out by counsel for the defendant ICBC dated the 12th of March 2009 that the matter be set for hearing for five days commencing Monday, the 13th of September 2010. It is my understanding that a jury notice was filed.

[18] So far as the application brought by the plaintiff to cross-examine Mr. Smith on his affidavit and for production of documents in relation thereto, the plaintiff contends that it is germane to the issue of whether or not the defendant is able to withdraw the admissions made both by letter and at the outset of the trial before Mr. Justice Romilly. Counsel contends that all investigative details are relevant to whether or not the admission can be withdrawn.

[19] It is clear that when a new trial is ordered, the pleadings as at that time will govern how the matter proceeds. The original statement of defence contends there is no cause of action pursuant to s. 24(1) of the *Insurance (Motor Vehicle) Act* as the identity of the driver and/or owner was ascertainable. The Court of Appeal has directed there be a new trial.

[20] No authority was presented by counsel for the plaintiff to indicate that when a new trial is ordered there is any “overhang” from the original trial thus I am satisfied that any admissions made prior to or during that trial have no applicability at the new trial which is scheduled to commence the 13th of September.

[21] Thus the sought after analysis of the contents of Mr. Smith’s affidavit I am satisfied is not germane to the applications before me. Therefore that application is dismissed.

Withdrawal of Admission/Information Admission

[22] Both counsel for the defendant and the plaintiff argued at length as to whether or not the admission made prior to the trial before Mr. Justice Romilly need be withdrawn or alternatively, whether it is the responsibility of the plaintiff to amend its pleadings to plead estoppel insofar as the admission is concerned. Much debate took place as to whether or not there was a formal admission therefore requiring leave to withdraw and the like.

[23] The decisions of *McLuskie v. Sakai* (1987), 12 B.C.L.R. (2nd) 372, *Anderson v. Minor* (1966), B.C.J. No. 1319, *Norlympia Seafoods Ltd. v. Dale & Co.* (1982), 41 B.C.L.R. 145 and *ICBC v. Nisbet*, 2009 BCSC 1570, 2009 CarswellBC 3099 and others were referred to in this regard.

[24] As the Court of Appeal on the 20th of May 2008 ordered a new trial, this issue, in my view, becomes moot. Positions taken by either party at or prior to the original trial will not have any applicability at the new trial. The pleadings are as they were at the commencement of the first trial subject of course to the amendments sought. Counsel provided the authority *Dawson v. Great Central Railway* (1919), K.B.D. Vol.

88, 1177 at page 1181:

Swinfen Eady, M.R. — ... The admission was only for the purpose of that trial; they may make another admission. It is not a question of withdrawal. On the new trial they may not make the same admission, but some other admission. They are not bound on the second trial by an admission made on the first trial for the purpose of that trial.

Application to Amend Statement of Defence

[25] Counsel seek the following amendments to the Statement of Defence:

- 2a. Furthermore, the Defendant says that the accident was not a hit and run, but instead the Plaintiff knew that the identity of the other driver involved in the accident was Heather Sawicki ("Mrs. Sawicki"), and that after the accident the Plaintiff told Mrs. Sawicki to leave the scene of the accident.
- 2b. In the alternative, that the Plaintiff did not know that the identity of the other driver at the time of the accident was Mrs. Sawicki, the Plaintiff had the means of knowledge to ascertain her identity and intentionally refused to do so, and as such no cause of action arises pursuant to s. 24 of the *IMVA*.
- 2c. In the further alternative, that the Plaintiff did not know the identity of the other driver at the time of the accident was Mrs. Sawicki, the Plaintiff has known her identity since in or around 2007 and has not named her as a defendant in this action, and as such no cause of action arises under section 24 of the *IMVA*.

[26] It is clear that the plaintiff well knew the contention of ICBC; that he knew the identity of the driver involved in the collision, if only by reason of the charges which were laid on the 27th of November 2007 and the application by ICBC to re-open the trial which took place the 13th of December 2007.

[27] I am satisfied that there is no surprise in the application to amend the statement of claim in relation to these three paragraphs. All that is accomplished by the amendment is to add specificity to the denial in paragraph 2. The application to amend the statement of defence is allowed.

Amendment Adding Counterclaim - Application to Add Zoltan Sandli

[28] This matter is somewhat more problematical. The accident which gives rise to the plaintiff's claim took place on the 24th of May 2002 and statements were made by Messrs. Gibson and Sandli on the 27th of May 2002 and the 13th of June 2002 respectively. Counsel on the part of ICBC contends that as it did not know until the 10th of May 2007 when the ICBC tip line received a tip that the accident had been falsely reported as a hit and run. The counterclaim is not out of time as there is a six year limitation in relation to fraud.

[29] Leave is required to file the counterclaim against the plaintiff.

[30] A decision of Master Powers, as he then was, in *Allen v. Bergen*, 1993 CanLII 447 provides a good review of the law relating to the late filing of an amended defence and counterclaim. In that matter application was brought to strike the counterclaim and the Court found that making such an order would simply lead to additional cost and expense to both of the parties. Master Powers dismissed the application to strike the counterclaim. A pivotal issue in the matter was that the limitation period had not expired.

[31] It is interesting to note that also in that decision Master Powers had to determine whether or not the counterclaim be heard at a time separate from that of the plaintiff's proceeding. The trial of that had been set for some three months following the date of the decision.

[32] Here, there is a five-day trial set for the 13th of September.

Prejudice

[33] The eight anniversary of the accident which the plaintiff claims gives rise to his damages has passed. The accident occurred the 24th of May 2002. The original trial commenced the 26th of February 2007. The Court of Appeal gave reasons for judgment directing that a new trial be held the 28th of May 2008. Apparently it was ICBC who issued the notice of trial and a jury notice the 19th of March 2009.

[34] It is contended on the part of the plaintiff that it would be severe prejudice if the amendments, and in particular, the counterclaim, are ordered.

[35] Although no specific notice of ICBC's intention was provided to counsel for the plaintiff until March of this year, I am satisfied that it has been well known, in particular, to Mr. Gibson, and in a lesser extent, to Mr. Sandli, that the petitions initially taken in this matter were not going to be continued.

[36] This matter has been long protracted as a result of various applications on appeal which had occurred. However, as I am satisfied that the claims relating to fraud are not affected by a limitation period, it is appropriate that the amendments be ordered.

[37] In the event that it is found that Mr. Gibson's claim is proven and that neither he nor Mr. Sandli was involved in the allegations contained in the counterclaim, they can, of course, be compensated for in costs.

[38] There are clearly significant issues to be met by the plaintiff and Mr. Sandli in the event the counterclaim proceeds in September. Damages in the range of \$200,000 are claimed and one would presume that a full investigation would be required into the legitimacy of those alleged damages by counsel for Mr. Gibson and by Mr. Sandli. Given that the original trial took six days and all that is set for September is five days, it is unlikely that all matters will be able to be dealt with at that time.

[39] Although the plaintiff Peter Gibson and Zoltan Sandli, now added as a defendant by way of counterclaim, were charged with mischief pursuant to s. 42.1 of the *Insurance (Motor Vehicle) Act* on the 27th of November 2007, a stay was entered in relation to that charge.

[40] As the applications dealt with, originally set for two hours, extended well beyond that time and perhaps also as it does not appear that Mr. Sandli was served with the application that he be added, the position taken by ICBC is similar to that in relation to the counterclaim itself in that as ICBC contends the limitation period has not expired there would be no bar to it starting a separate action against Mr. Sandli. Thus as such a cause of action would involve much of the same factual basis as ICBC's claim against the plaintiff Mr. Gibson, it would be an unnecessary duplication of time and effort, that there be a separate action. I am satisfied it is appropriate that Mr. Zoltan Sandli be added as a defendant by way of counterclaim.

Application for the Plaintiff to Attend an Examination for Discovery

[41] A separate application was brought by ICBC seeking a further examination of the plaintiff, Mr. Gibson, as a result of the amendment, intervening events, i.e. the tip line information. It would seem to follow from the amendment which has been granted that a further examination is appropriate just as ICBC will be required to provide relevant documents as a result of the amendment they sought and obtained. There will be further examination of the plaintiff, limited to the amendments ordered.

Application for Severance

[42] It is contended on the part of ICBC that in the event the Court finds the plaintiff either knew or could ascertain the name of the driver, then his claim against ICBC will be unsuccessful. Similarly, in the event that the Court were to find that the plaintiff could not ascertain the name of the driver and did not lie about the circumstances relating to the accident, ICBC would be unsuccessful in its counterclaim claiming fraud.

[43] In either event, the issue of damages could then be dealt with. It should be recalled that both the plaintiff and ICBC appealed the decision of Romilly J. in relation to quantum of the plaintiff's damages. No conclusions of course have been reached as to whether or not the plaintiff should be found responsible to ICBC for expenses and/or damages in relation to which it claims in its counterclaim.

[44] Both counsel recognized that if the five days set aside for trial in September are to be utilized, this case should be case managed.

[45] I would recommend case management occur and urge both counsel to cooperate to obtain an early date. I am satisfied that the question of severance should be addressed by the case management judge.

Summary

[46] The plaintiff's application to cross-examine Doug Smith on his affidavit is dismissed.

[47] The defendant's application to amend its defence is granted.

[48] The defendant's application to further discover the plaintiff on issues resulting from the amendment is granted.

[49] The defendant's applications to amend to add a counterclaim and add Zoltan Sandli as a defendant by way of counterclaim are granted.

[50] The defendant's application to sever the issues of liability and damages referred to a case management judge.

[51] Each party will be responsible for their own costs of these applications.

"Master A. Donaldson"