Case Name:

Dhingra v. Pham

Between
Hari Krishan Dhingra, plaintiff (respondent), and
Quen Thi Hong Pham, Mang Van Pham, Jose Domingos Vicente and Cosima Caterina Vicente, William Boraski and Westlock Pony Express (1984) Ltd., defendants (applicants)

[2004] A.J. No. 1545

2004 ABQB 973

377 A.R. 151

136 A.C.W.S. (3d) 415

Docket No. 0303 03980

Alberta Court of Queen's Bench
Judicial District of Edmonton

Veit J.

Heard: December 10, 2004.
Judgment: December 22, 2004.
Filed: December 23, 2004.

(38 paras.)

Civil procedure -- Costs -- Bullock or Sanderson order.

Appeal by the defendants, Pham and Pham, from the order requiring them to pay the costs of the defendants, Vicente and Vicente, including double costs after a rejected offer. The plaintiff, Dhingra, brought an action against the Phams and the Vicentes, following a motor vehicle accident. His vehicle was struck by the Vicentes' vehicle, which in turn had been struck by the Pham vehicle. Dhingra had given a statement to his insurance adjuster that the Vicente vehicle was pushed into his

vehicle by the Pham vehicle.

HELD: Appeal dismissed. The Phams never admitted their responsibility for the collision, and therefore obliged Dhingra to maintain his action against the Vicente defendants. This was an appropriate case for a Sanderson order. Dhingra acted reasonably in refusing the offer.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 505(3).

Alberta Rules of Practice.

Counsel:

Sandra L. Corbett, Parlee McLaws LLP, for the Appellants

Brij Mohan, Doherty Schuldhaus, for the Respondent

MEMORANDUM OF DECISION

VEIT J.:--

Summary

1 The Pham defendants appeal the Master's award of a Sanderson costs order against them, requiring them to pay all the costs of the Vicente defendants - including double costs awarded after a rejected offer - on the grounds that it was not reasonable for the plaintiff to include the Vicente defendants in this lawsuit. The Pham defendants rely on the fact that, within 6 days of the accident, Mr. Dhingra gave a statement to his insurance adjusted indicating that the Vicente vehicle was simply pushed into the rear of the plaintiff's vehicle after the Vicente vehicle had itself been rear-ended by the Pham vehicle. They assert that, in those circumstances, the plaintiff should not have sued the Vicentes.

2 Mr. Dhingra notes that the statement that he provided was not sworn and was reduced to writing by the insurance adjuster. More importantly, he asserts that, in a situation such as this one, where he had no direct knowledge that Ms. Pham propelled the Vicente vehicle into him, it was reasonable for him to join both defendants in the action: Pettipas, Besterman. Immediately upon hearing Ms. Pham's sworn account of the collision during discovery, Mr. Dhingra offered to discontinue his action against the Vicente defendants on a without costs basis. That offer was rejected.

3 The Master's decision is repeated: the Pham defendants will pay all the costs of the Vicente defendants.

4 There is no dispute between the parties concerning the nature of the test to determine whether contribution by an unsuccessful defendant should be made toward a successful defendant's costs: they agree with the formulation of the test as articulated, for example, in the recent O'Meara decision.

5 This court adopts the approach of the Master: in circumstances such as these, where the Phams not only defended the action after having received the affidavit of Jose Vicente but never admitted their responsibility for the collision, the Pham defendants obliged Mr. Dhingra to maintain his action against the Vicente defendants. This is therefore an appropriate case for a Sanderson order.

6 The issue of whether the Pham defendants should pay the double costs awarded to the Vicente defendants from the time of their offer of judgment is to be determined in the same way as is the issue of whether a Sanderson order should go: did Mr. Dhingra behave reasonably in rejecting the offer of judgment when it was presented. Since the offer was presented concurrently with the Statement of Defence, and since Mr. Dhingra had no personal knowledge of the actions of either the Vicente or the Pham vehicles, it was reasonable for Mr. Dhingra to reject the offer of judgment and to await until liability could be "threshed out".

Cases and authority cited:

7 By the Pham Defendants/Applicants: Ross v. McRoberts, [1999] A.J. No. 858 (C.A.); General Motors Acceptance Corp. of Canada v. Sherwood, [1992] A.J. No. 999 (C.A.); Fidelity Trust Co. v. Philion, [1985] A.J. No. 624 (Q.B.); O'Meara v. Yule, [2004] Carswell Alta. 204 (Q.B.); Dix v. Canada (Attorney General) [2002] Carswell Alta. 1006 (Q.B.); Allen (Next friend of) v. University Hospitals Board, [2000] A.J. No. 1579 (Q.B.); Lee (Guardian ad litem of) v. Richmond Hospital Society, [2002] Carswell B.C. 1312 (S.C.); Greep v. Josephson, [2001] Carswell Alta. 542 (Q.B.); Fowler v. Crawford, [1991] Carswell N.B. 366 (Q.B.); Hock (Next friend of) v. Hospital for Sick Children, [1998] Carswell Ont. 1702 (C.A.).

8 By the Plaintiff/Respondent: Matwychuk v. Western Union Insurance Co., [1992] A.J. No. 928 (Q.B.); Vegreville Electrical Services (1996) Ltd. v. 695093 Alberta Ltd., [1998] A.J. No. 665 (Q.B.); Macleod v. Great West Distributors Limited and Whyte & Company Limited, [1941] 3 W.W.R. 827 (Alta. D.C.); Pettipas v. Klingbeil, [2000] A.J. No. 1289 (Q.B.); Besterman v. British Motor Cab Company Limited, [1914] 3 K.B. 181; O'Meara v. Yule, [2004] A.J. No. 215 (Q.B.); Wenden v. Trikha, [1992] A.J. No. 217 (Q.B.).

9 By the court: Dhingra v. Pham [2003] A.J. No. 1703 (M.); Tat v. Ellis [1999] A.J. No. 36 (C.A.); Simpson v. Bender, [1996] 5 W.W.R. 96 (Alta. Q.B.); McAteer v. Devoncroft Developments Ltd. [2003] A.J. No. 592 (Q.B.); King v. Zurich Insurance Co. [2002] E.W.J. No. 1835 (C.A., Civ. Div.); Seavision Investment S.A. v. Evennett [1992] E.W.J. No. 4194 (C.A., Civ.

Div.)

Appendix A: Chronology of proceedings

1. Background

10 The applicants have provided the useful chronology that is set out as Appendix A.

11 The unsworn statement given on October 3, 2002 by the plaintiff Mr. Dhingra to his insurance adjuster, taken down by the insurance adjuster, and signed by both Mr. Dhingra and the adjuster, contained the following statement:

> I stopped for a red light. I was stopped for 1 or 2 minutes. I heard a bang then I was rear ended. My car was pushed forward about 1 foot. I was able to get out of the vehicle. There were two cars behind me. The third car had rear ended the car behind me and pushed this car into me. There was one man in the car behind me and one lady in the third car.

12 The decision appealed from can be found at the citation given.

2. Standard of review

13 While an appeal from a Master is indeed a hearing de novo, the court should not lightly disturb a Master's decision: Matwychuk, Vegreville Electrical Services (1996) Ltd.

3. Is leave required to appeal only a costs order?

14 For the purposes of this decision, in the absence of objection by the respondent, I assume without deciding that the prohibition in R. 505(3) against "any appeal" of a costs order without leave of the court giving the order has no application here.

4. What is the test to determine whether an unsuccessful defendant should contribute toward a successful defendant's costs?

15 The parties agree that the Master used the correct, three part test as articulated in O'Meara and in other decisions, to determine whether contribution should be made by an unsuccessful defendant to a successful defendant's costs:

> a) was it reasonable for the plaintiff to join the successful defendants, given the circumstances;
> b) is there any good reason to deprive the successful defendants of costs; and,
> c) were the unsuccessful defendants, vis-a-vis the successful defendants, wholly responsible for the action.

16 In interpreting the test, it is somewhat helpful to return to the English authorities, where the Bullock and Sanderson orders were originally developed, to examine the policy framework in which the three-part test was created. In King, the English Court of Appeal stated:

> [para33] It is trite law that a judge's decision on costs is a matter of discretion. As such, this court will only interfere if it can be shown that the judge erred in principle in his approach or left out of account some relevant factor or took into account an irrelevant factor or if the decision is plainly wrong. (See AEI Ltd v. Phonographic Performance Ltd [1999] 1 W.L.R. 1507, 1523 C.) The judge had to deal here with a not uncommon situation where a claimant was unsure which of the defendants would be held liable for his injury and where - in the event - he succeeded against one but failed against the other. In the days before the Civil Procedure Rules came into effect this situation would often be met by a Bullock order. (See Bullock v. The London General Omnibus Company [1907] 1 K.B. 264) ordering the plaintiff to pay the successful defendant's costs but ordering the unsuccessful defendant to pay those costs over to the plaintiff. In cases where a plaintiff was legally aided the order would often be a Sanderson order (see Sanderson v. Blyth Theatre Company [1903] 1 K.B. 533) whereby the unsuccessful defendant was ordered to pay the costs of the successful defendant directly. These decisions reflected the approach of the courts, namely that where a plaintiff had behaved reasonably in suing both defendants he should not normally end up paying costs to either party even though he succeeded only against one of the defendants.

17 As to the way in which the court's discretion might be used, we find the following comments from the English Court of Appeal in Seavision Investment:

> Prima facie, no doubt, the judge will proceed on the basis that the party who has failed against one defendant and whose own costs are a legitimate head of damage against the other, should have such costs against the other on the same basis as would have prevailed had he claimed them as damages against the other defendant in a separate action. But depending on the way the whole action has been conducted by all the various parties I see no reason why he should not depart from that basis to reflect his view of their respective conduct.

18 In other words, as might be expected, in determining whether a Sanderson or Bullock order should be made the court should review all of the conduct of all of the parties.

19 The various issues raised on this appeal will be determined according to the answer given to the question as to whether the plaintiff acted reasonably in the proceedings, and whether the court should exercise its discretion to relieve the Pham defendants of a costs award that might otherwise be imposed.

5. Did the plaintiff behave reasonably relative to the Vicente defendants?

20 In determining whether a Sanderson order should issue, it is important to note that the test is whether the plaintiff's decisions at various points in the litigation were reasonable; the plaintiff's decisions do not have to be perfect. In making decisions about reasonableness, the court must guard against the false clarity of hindsight.

a) Was it reasonable for the plaintiff to initiate proceedings against the Vicente defendants?

21 Mr. Dhingra behaved reasonably in starting an action against the Vicentes. Naturally, shortly after the accident, he had come to some opinion about how the accident occurred, but that opinion could not form a reliable basis for excluding the Vicentes from the lawsuit. First, Mr. Dhingra, as he asserts, was injured in the collision; his own observations and feelings might have been dulled, or at least affected, by the collision itself. Moreover, even if he had formed an opinion about the way in which the collision occurred, it was prudent for him to take all reasonable measures to allow himself to be in a position to meet the required standard of proof for success - to acquire evidence to prove who was responsible for the collision. There is often a gap between opinion and proof. As the Besterman court observed, pre-trial proceedings are often required in order to fully "thresh out" the evidence on the issues. Mr. Dhingra was entitled to initiate an action against the Vicentes since it was their vehicle that actually struck him.

b) Was it reasonable for Mr. Dinghra to keep the Vicentes in the lawsuit as long as he did?

22 I share the Master's view that, because the Phams denied liability, it was reasonable for Mr. Dinghra to keep the Vicentes in the proceedings as long as he did. Indeed, as our Court of Appeal observed in Tat:

> [para47] In awarding costs on double column 6 the trial judge conveyed his disapproval of the defendants' failure to admit liability even though it was clearly beyond dispute. But Ellis argues that the trial judge failed to recognize an insurer's obligation not to admit liability. We question whether any such duty would apply where liability is so clearly established. In any event, any duty that might exist would be owed by the insurer and should not be borne by the plaintiff.

23 In the situation here, I adopt the opinion of the Master:

> With respect to the evidence set out in the Affidavit of Jose Vicente sworn May 21, 2003, the simple response to the argument by counsel for the Pham Defendants is that if the matter was so clear in light of that evidence that the Plaintiff ought not to have continued proceedings as against the Vicentes then

> why was it appropriate for those same Defendants, who also had the benefit of that evidence, to file a statement of defence on June 16, 2003 denying that a collision occurred or that they were negligent as alleged or at all.

24 Although other litigants might have acted differently than Mr. Dhingra, that is not the test. Mr. Dhingra acted reasonably and prudently in the circumstances.

c) Did the Pham defendants attempt to throw the blame on someone else?

25 The case law states that a relevant factor for the Court to consider in determining whether a Sanderson order is appropriate is whether the unsuccessful defendants attempted to throw the blame on someone else. In this case, the Pham defendants never made any allegations against the Vicente defendants.

26 However, although the second test for a Sanderson order is often expressed in the way set out earlier, one feature of that test is the recognition that, while judges have a discretion in the matter of costs, that discretion must be exercised judicially, and a successful litigant should not normally be deprived of costs. In this case, of course, Mr. Dhingra has been successful; prima facie, he should not be responsible for costs. Also, the Vicente defendants have been successful; they should not have to pay costs. The only party that has been unsuccessful are the Pham defendants; they are the ones who should be paying costs, and it is reasonable that the order should be a Sanderson rather than a Bullock order.

d) Is the fact that Mr. Dhingra's claims against both the Vicente and the Pham defendants have the same factual basis determinative of the issue of whether a Sanderson order is appropriate?

27 Relying on the Hock decision, the Pham defendants assert that the fact that Mr. Dinghra's claims against the defendants may have the same factual basis is not determinative of whether a Sanderson order is appropriate.

28 In my view, far from assisting the applicants, the Hock decision demonstrates why their position is erroneous: in that case the Court of Appeal issued a Bullock or Sanderson order because, although "the role of ICU defendants differed factually from that of the cardiologist, and the cardiac surgeon, the claim against all defendants was based on the contention that the individual defendants, or some of them, were negligent." So it is in this case: Mr. Dhingra's reasonable assertion was that the Vicentes and the Phams were, or one of them was, negligent.

29 I agree with the re-formulation of the test for making a Sanderson order as articulated by Rooke J. in McAteer as follows:

> A trial judge is entitled to exercise his or her discretion to [make a Bullock/Sanderson] order where:

> . . . (3) as between the co-defendants, the unsuccessful defendant was wholly responsible for the action.

30 Indeed, that formulation had earlier been used by Murray J. in Simpson:

> In Alberta we have developed a three part test for determining the propriety of awarding a Bullock or Sanderson Order. This test was enunciated by Bury D.C.J. in McLeod v. Great Western Distributors Ltd., [1941] 3 W.W.R. 827 at 829 where his Honour said:
>
> . . .
>
> (3) That as between the co-defendants the unsuccessful defendant was wholly responsible for the action, or to use the words of Jessell, M.R. in the Rudow case [50 L.J. Ch. 504], that the unsuccessful defendant 'is liable to them [his co-defendant for costs] as between himself and his co-defendant.'"

31 Here, the Pham defendants were wholly responsible for the collision. Therefore, prima facie, they should be liable for the costs of the Vicente defendants. The Pham defendants have not rebutted that prima facie conclusion.

6. Should the Pham defendants be responsible for the Vicente defendants' double costs?

32 The Vicente defendants served an offer of judgment on the plaintiff concurrently with their statement of defence. The Pham defendants were never served with that offer of judgment. The Pham defendants therefore take the position that they should not be responsible for payment of the Vicente defendants double costs for Mr. Dhingra's unilateral decision, in the face of the Vicente formal offer of judgment, to maintain his action against the Vicente defendants.

33 The fact that the Vicente offer of judgment was not served on the Pham defendants is not determinative of whether they should be responsible for double costs: the decision whether to accept the offer of judgment was solely in the hands of the plaintiff. Under Alberta Rules of Practice, an offer of judgment from a defendant need only be made to the plaintiff, not to co-defendants.

34 The very point of the Sanderson order is that it protects the plaintiff from costs incurred in relation to the successful defendant, including any double costs that were ordered.

35 In dealing with the issue of liability for double costs after an offer of judgment, as in all other matters respecting the appropriateness of a Sanderson order, the issue is whether Mr. Dhingra acted reasonably in refusing the offer: Pettipas. I have concluded that Mr. Dhingra acted reasonably in refusing an offer of judgment given the fact that this offer was made concurrently with the Vicente statement of defence. A prudent plaintiff would wait to have irrefutable evidence, such as sworn evidence on discovery, rather than, for example mere pleadings, before making a decision on eventual liability. A plaintiff in the situation of Mr. Dhingra should not be stampeded into giving up a claim.

36 Moreover, from the perspective of fairness to the Pham defendants, it cannot be said that they are caught by surprise by the double costs order: they were in a much better position than was Mr. Dhingra to know what caused the accident. They knew that Ms. Pham ran into the back of the Vicente vehicle because the sun was in her eyes and she did not see the Vicente vehicle. With that knowledge in hand, the Pham defendants might have expected an early offer of judgment from the Vicentes to the plaintiff and that likelihood should have been within their consideration in failing to admit liability for the collision.

7. Conclusion

37 In the result, the Master's Sanderson order is confirmed.

8. Costs of this hearing

38 If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

VEIT J.

* * * * *

Appendix "A"

UPDATED CHRONOLOGY (SHOWING COSTS INCURRED)

September 27, 2002 - the Accident occurs

October 3, 2002

- the Plaintiff makes a statement about circumstances of the Accident

March 4, 2003

- Statement of Claim is issued

March 22, 2003 - Vicente Defendants are served with Statement of Claim

March 24, 2003 - Vicente Statement of Defence/Offer of Judgment filed and served on Plaintiff

* COSTS FOR ITEM 1(1) PLEADINGS: $1,200.00 (SINGLE COLUMN 3)

April 5, 2003 - Pham Defendants are served with Statement of Claim

May 27, 2003 - Vicente Defendants file Notice of Motion and supporting Affidavit for Summary Judgment (dismissal) of action against them

May 30, 2003 - Vicente Defendants file supporting Affidavit appending Plaintiff's

October 3, 2002 - statement June 16, 2003 - Pham Defendants file Statement of Defence - Vicente Defendants file Notice to Admit Facts

June 17, 2003 - Notice to Admit Facts served on Pham Defendants by Vicente Defendants - Notice to Admit Facts also served on Plaintiff (see Tab 10 in Plaintiff's Brief - Page 32, Lines 1 to 6)

* COSTS FOR ITEM 4 NOTICE TO ADMIT: $800.00 x 2 = $1,600.00 (2 x COLUMN 3)

June 18, 2003 - Quen Pham (driver of Pham vehicle) examined for Discovery - Pham Statement of Defence served on Plaintiff and Vicente Defendants

* COSTS FOR ITEM 5 ORAL DISCOVERY: $1,000.00 x 2 = $2,000.00 (2 x COLUMN 3)

June 25, 2003 - Plaintiff files Notice of Motion and supporting Affidavit for Summary Judgment against Pham Defendants June 27, 2003 - Pham Defendants file Statement of Denial to Notice to Admit Facts

July 3, 2003 - Pham Defendants serve Statement of Denial to Notice to Admit Facts on Plaintiff and Vicente Defendants

July 24, 2003 - Pham Defendants' Affidavit of Records filed

August 14, 2003 - Vicente Defendants' Affidavit of Records filed

* COSTS FOR ITEM 3(1) DOCUMENT DISCOVERY: $1,000.00 x 2 = $2,000.00 (2 x COLUMN

3)

September 19, 2003

- Summary Judgment (dismissal) and Bullock/Sanderson Order applications heard by Master Smart

* COSTS FOR ITEM 6(1) UNCONTESTED APPLICATION: $600.00 x 2 = $1,200.00 (2 x COLUMN 3)

cp/e/qlemo