Case Name:

Sidhu v. Hothi

Between
Manjit Kaur Sidhu and Harpreet Kaur Sidhu by her Litigation Guardian, Manjit Kaur Sidhu, Appellants (Plaintiffs), and Baljit Kaur Hothi also known as Baljit Hothi and Bhupinder Singh Hothi, also known as Bhupinder Hothi, Respondents (Defendants)

[2014] B.C.J. No. 3149

2014 BCCA 510

2014 CarswellBC 3862

248 A.C.W.S. (3d) 54

61 C.P.C. (7th) 63

69 B.C.L.R. (5th) 111

Docket: CA041306

British Columbia Court of Appeal
Vancouver, British Columbia

M.V. Newbury, P.D. Lowry and D.F. Tysoe JJ.A.

Heard: December 10, 2014.
Judgment: December 23, 2014.

(27 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Amendment of -- Statement of defence -- To withdraw admission of liability -- Appeal by plaintiffs from judgment permitting defendants to withdraw admissions dismissed -- 2010 litigation commenced by mother and daughter seeking damages for personal injuries suffered in accident caused by defendant -- In 2013, defendant sought

to withdraw admission mother and daughter occupied vehicle after learning of eyewitness account stating vehicle was occupied solely by male driver -- Chambers judge did not err in overturning Master's decision refusing withdrawal of admission -- Chambers judge correctly weighed delay against prevailing factors, particularly possibility that refusal could perpetrate fraud upon court -- Withdrawal allowed assessment of plaintiffs' claim on merits.

Damages -- Proceedings -- Practice and procedure -- Pleadings -- Appeal by plaintiffs from judgment permitting defendants to withdraw admissions dismissed -- 2010 litigation commenced by mother and daughter seeking damages for personal injuries suffered in accident caused by defendant -- In 2013, defendant sought to withdraw admission mother and daughter occupied vehicle after learning of eyewitness account stating vehicle was occupied solely by male driver -- Chambers judge did not err in overturning Master's decision refusing withdrawal of admission -- Chambers judge correctly weighed delay against prevailing factors, particularly possibility that refusal could perpetrate fraud upon court -- Withdrawal allowed assessment of plaintiffs' claim on merits.

Appeal by the plaintiffs from a judgment permitting the defendants to withdraw admissions. In 2008, the defendant, Hothi, struck a Jeep while attempting a left turn. The plaintiff, Manjit Sidhu, alleged she was the driver of the Jeep, and that her daughter, Harpreet, was a passenger. In 2010, they commenced an action seeking damages and insurance benefits for personal injuries. The defendants admitted responsibility for the accident in their Response to the Civil Claim filed in 2011. In 2012, the insurance adjuster spoke to a witness who stated that the driver of the Jeep was a male, and no passenger was in the front seat. The insurer immediately notified the plaintiff that it would seek to amend the defendants' pleading to withdraw the admissions that the plaintiffs were the occupants of the Jeep. In 2013, the application came before a Master who refused the relief sought. The defendants appealed to a chambers judge. The judge found that the admission was made without knowledge of the witness account, that there was a triable issue as to whether the plaintiffs occupied the Jeep at the time of the accident, and that it was not in the interests of justice to refuse withdrawal of the admission. The plaintiffs appealed.

HELD: Appeal dismissed. The chambers judge did not err in rehearing the matter anew, as the application for the withdrawal of the admission was a matter vital to the final issue of the case. The chambers judge did not err in concluding that the factors weighed in favour of the defendants' position. The chambers judge correctly weighed the delay factor against the fact that the admission was made in the absence of knowledge of evidence, resulted from oversight, and, if allowed to stand, raised the possibility of perpetration of fraud upon the court. Allowing the withdrawal ensured that the plaintiffs' claim would be heard on the merits.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Civil Rules, Rule 1-3, Rule 7-7(5)

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 96

Regulations to the Insurance (Vehicle) Act, RSBC 1996, CHAPTER 231

Supreme Court Act, RSBC 1996, CHAPTER 443, s. 11(7)

Court Summary:

Appeal dismissed from order allowing defendants to withdraw admission in pleading that plaintiffs were driver and passenger in car involved in motor vehicle accident. "Test" in Hamilton v. Ahmed had been correctly applied. Defendants had become aware of evidence that plaintiffs were not in the car at time of accident, as previously admitted.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated September 24, 2013 (*Sidhu v. Hothi*, 2013 BCSC 1753, New Westminster Docket No. M127603).

Counsel:

Counsel for the Appellants: B. Mohan.

Counsel for the Respondents: C.C. Godwin.

Reasons for Judgment

The judgment of the Court was delivered by

1 M.V. NEWBURY J.A.:-- This appeal arises out of a motor vehicle accident that occurred on July 7, 2008 in Surrey, British Columbia. As the defendant Mr. Hothi was attempting to make a left turn from 68A Avenue onto 126th Street, his vehicle struck a Jeep which had been travelling along 126th Street.

2 Ms. Manjit Sidhu alleged that she had been the driver, and her daughter Harpreet Sidhu a passenger, in the vehicle struck by Mr. Hothi and that they had suffered personal injuries in the collision. They commenced this action by Writ of Summons filed on May 19, 2010 and sought damages and benefits under Part 7 of the Regulations to the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. The defendants admitted responsibility early on, and confirmed that admission in their Response to Civil Claim filed March 3, 2011.

3 Because of this early admission, it appears the defendants' insurer was not assiduous in

obtaining statements from witnesses to the accident. In February 2012, however, an ICBC adjuster spoke to a witness, Mr. Chaudhry, who resided at the northeast corner of the intersection. Mr. Chaudhry said in his written statement to ICBC that the driver of the Jeep had been a male and that he had not seen any passenger in the front seat. Immediately after the accident, he said, the driver sat still "like he was frozen", and then drove off along 68A Avenue. Mr. Chaudhry accompanied a passing motorist in pursuit of the Jeep, which they found parked in a driveway two blocks away. Mr. Chaudhry and the other motorist returned to the scene of the accident and told the police where the Jeep was. Mr. Chaudhry's statement was confirmed in a later one taken in November 2012.

4 Immediately upon receiving this information, ICBC cancelled its participation in a scheduled mediation and notified counsel for the plaintiffs that it would be seeking to amend the defendants' pleading -- i.e., withdrawing their admission that the adult plaintiff had been driving the Jeep and that the infant plaintiff had been a passenger. The application was not made, however, until about a year after counsel notified counsel for the plaintiffs of his intention to amend his Response. No explanation was given for the delay.

5 The matter came before a master on May 29, 2013. As he observed, the application engaged a more stringent test than the test for a simple amendment of pleadings. Rule 7-7(5) provides that:

> 7-7(5) A party is not entitled to withdraw
>
> (a) an admission made in response to a notice to admit,
>
> (b) a deemed admission under subrule (2), or
>
> (c) an admission made in a pleading, petition or response to petition except by consent or with leave of the court.

6 In his reasons, which are indexed as 2013 BCSC 939, the master quoted a passage from the reasons of Master Bouck in *Hurn v. McLellan* 2011 BCSC 447 which in turn applied the well-known test formulated by Master Horn in *Hamilton v. Ahmed* (1999) 28 C.P.C. (4th) 139, to which I shall return below. Master Bouck went on to state:

> More recently, the test has been articulated by the court in *374787 B.C. Ltd. v. Great West Management Corp.*, 2007 BCSC 582 at para. 27:
>
> > As a general rule, the Court must consider whether in the circumstances of the case the interests of justice justify the withdrawal of the admission. The following facts, which are not exhaustive are relevant: delay, loss of a trial

> date, a party is responsible for an erroneous admission, inadvertence in the making of an admission and estoppel ...
>
> The question of fault for the accident is one of mixed fact and law: *Bedwell v. McGill*, 2008 BCCA 6 at paras. 33 to 34, foll'g *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, [2002] 2 S.C.R. 235 at para. 27 (S.C.C.), per Iacobucci and Major JJ.
>
> However, whether the admission sought to be withdrawn is one of fact, law or mixed law and fact, the same legal test applies: *Nesbitt v. Miramar Mining Corp.*, 2000 BCSC 187 at para. 6.
>
> It is not enough to show that [a] triable issue exists. The applicant must show that, in all of the circumstances, the interests of justice require the withdrawal of the admission: *Rafter v. Paterson*, [[1997] B.C.J. No. 2509] (November 7, 1997), Vancouver No. B924884.
>
> Moreover, even if a trial date is not imminent and the applicant gave early notice of the proposed withdrawal of the admission, delay in bringing an application for such relief might in itself be a "concern that cannot be overcome": *Sureus v. Leroux*, 2010 BCSC 1344. [At paras. 29-33.]

7 In the case at bar, the master concluded that the defendants should not be permitted to withdraw their admission of liability, since "The application fails to meet virtually all of the tests laid out in the *Hamilton v. Ahmed* ... decision." (Para. 21.) In particular, he found that the admission had not been made inadvertently or hastily, given that the file had been in the hands of a professional adjuster since shortly after the accident and the adjuster had received a report from the RCMP within months of the accident. The report had contained the names of various witnesses including Mr. Chaudhry. It was impossible at this stage, the master said, to determine whether the admission was "true" or not, but the amendment would result in a "complete reassessment of the case" and perhaps in an adjournment of the trial; and the plaintiffs would be unable to obtain any evidence as to the condition of the Jeep, since it was no longer available. He dismissed the defendants' application, without enunciating any conclusion regarding the interests of justice as a whole.

8 The defendants appealed to a Supreme Court judge in chambers, Mr. Justice Jenkins, on September 12, 2013. His reasons are indexed as 2013 BCSC 1753.

9 After stating the facts and recounting the master's reasoning, Jenkins J. addressed the question of the standard of review in an appeal from a decision of a master. He quoted the standard as first

formulated by Mr. Justice Macdonald in *Abermin Corp. v. Granges Exploration Ltd.* (1990) 45 B.C.L.R. (2d) 188 (B.C.S.C.):

> An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the master. [At 193.]

This standard had been applied in *Nesbitt v. Miramar Mining Corporation* 2000 BCSC 187 in connection with an application to withdraw an admission of liability. The Court there noted that without the admission, the "primary issue would be different and the duration of the trial prolonged. A finding on the issue in the defendant's favour would be determinative of the action in its entirety." The Court in *Nesbitt* thus concluded that the question of the admission was "vital to the final issue in the case" and that accordingly it could be reviewed by a justice of the court without the necessity of the master's decision being clearly wrong. (See para. 24 of Jenkins J.'s reasons.)

10 Jenkins J. was of the view that similar reasoning applied in the case at bar and reviewed the master's decision on the basis that it was open to him to carry out a rehearing. He disagreed with many of the master's findings. Although the defendants' insurer and former counsel had clearly delayed in bringing the application on, he questioned whether significant prejudice to the plaintiffs had been shown. With respect to their contention that the delay meant they would no longer have evidence as to the condition of the Jeep, the judge reasoned that:

> ... The condition of the vehicle, and the need to undertake a forensic study of the same, is not necessary if the amendment were allowed. <u>The issue here is not damage to the vehicle, but whether the plaintiffs were actually in the vehicle at the time of the accident</u> or whether there was some other unknown male driving the vehicle.
>
> Regarding the master's comments on the inability to be able to investigate the seatbelt mechanism, as the defendant driver admitted liability within a few days of the accident, I find it would have been <u>highly unlikely either party would have investigated the seat belts</u>.
>
> Considering prejudice to the parties, if the amendment were allowed, the plaintiffs would still be able to pursue their claims for injuries suffered in the

> accident. The difference is that they would have to prove to the satisfaction of the trial judge that they were in the vehicle at the time of the accident. [At paras. 26-8; emphasis added.]

On the other hand, he said, if the amendment were not allowed, it was possible that a person who was not even injured in the accident could collect on an assessment of damages -- perpetrating, or at least permitting, a fraud on the court.

11 Turning to the legal test for the withdrawal of admissions, the chambers judge noted the test formulated by Master Horn in *Hamilton*, *supra*:

> There is no conflict between these decisions and I derive the following principles from them:
>
> 1. That the test is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact.
>
> 2. That in applying that test, all the circumstances should be taken into account including the following:
>
> 3. That the admission has been made inadvertently, hastily, or without knowledge of the facts.
>
> 4. That the fact admitted was not within the knowledge of the party making the admission.
>
> 5. That the fact admitted is not true.
>
> 6. That the fact admitted is one of mixed fact and law.
>
> 7. That the withdrawal of the admission would not prejudice a party.
>
> 8. That there has been no delay in applying to withdraw the admission. [At para. 11.]

The judge noted, correctly in my view, that "the test" is as stated at item 1 and that items 3-8 are factors to be considered in determining where the interests of justice lie when an application to withdraw an admission is before the Court. (Para. 33.) This principle has been enunciated many times by this court: see *Norlympia Seafoods Ltd. v. Dale* (1982) 41 B.C.L.R. 145 (C.A.) 145 and the cases cited at 148-9.

12 Applying the listed items to the case at bar, the chambers judge found that:

1. There was a triable issue as to whether the plaintiffs were in the Jeep at the time of the accident and it was not in the interests of justice to permit fraud on the court or on the defendants;

2. The admission had been made inadvertently and without knowledge of the evidence that a man had been driving the Jeep and no passenger had been seated in the front seat;

3. ICBC's failure to appreciate the significance of a reference made by Mr. Hothi to "the guy" who was driving the Jeep, was a matter of simple oversight or honest misunderstanding;

4. At the time the admission was made, the insurer had had no reason to follow up with witnesses who could have provided the new evidence;

5. Whether or not the fact admitted was one of mixed law and fact was irrelevant in this case;

6. No significant prejudice to the plaintiffs (the chambers judge mistakenly said "defendants", but his meaning was clear) would accrue if the application were allowed. The witnesses to the accident were still available and if the amendment were allowed and the trial judge found that the plaintiffs were not in the Jeep, the plaintiffs would "almost have gotten away with having committed a fraud on the defendants"; and

7. There was no reason to adjourn the trial as the result of allowing the application as the witnesses required to testify on the issue of identity were known and their evidence "could not be lengthy".

13 The only significant factor weighing against granting the application was the significant delay on the part of the defendants in making their application to withdraw the admission. In particular, the delay between the interview of Mr. Chaudhry in February 2012 until the application to withdraw was filed almost a year later was "inexcusable", as the defendants admitted. Nevertheless, the chambers judge concluded the delay could be overcome and compensated in costs, as had occurred in *Piso v. Thompson* 2010 BCSC 1746.

14 In the result, the chambers judge allowed the appeal from the master's order and permitted the admission to be withdrawn. He awarded costs on Scale B to the plaintiffs in any event of the cause.

On Appeal

15 In this court, the plaintiffs submitted in their factum that the learned chambers judge erred in various respects, including in applying the wrong standard of review to the master's decision, misapprehending the evidence, and in applying the legal test set out in *Hamilton v. Ahmed*. In his oral submissions, Mr. Mohan on behalf of the plaintiffs also took objection to the admission, by the court below, of Mr. Chaudhry's written statement of March 1, 2012 because it was not sworn. In counsel's submission, the statement was therefore hearsay and could not be relied upon to support a "finding" that (referring to item 5 of the *Hamilton* test) the fact admitted was not true. I will say at the outset that I see no merit in this argument. No objection was made in the court below or in counsel's factum on this point, and the evidence was adduced simply as proof of the fact that Mr. Chaudhry had made a statement that contradicted the impugned pleading. The veracity of the statement will be a matter for the trial court.

16 With respect to the question of prejudice, Mr. Mohan also suggested that as the Jeep has been destroyed, the plaintiffs have lost the opportunity to adduce expert evidence on the condition of the seatbelt in the vehicle which might confirm that the plaintiffs were indeed driver and passenger. When questioned more closely, he conceded that he had no knowledge whether expert evidence of this kind could be adduced, nor was he aware of any case in which a "seatbelt report" had been prepared. Even if such evidence might have been obtainable, however, Mr. Godwin advised that the Jeep had been "written off" prior to the filing of the defendants' pleading, such that the plaintiffs could not be said to be prejudiced by the later delay.

17 Finally, in more general terms, counsel argued that all of the factors set forth in *Hamilton* militate against the chambers judge's ruling, regardless of the standard of review applicable to the appeal from a master's decision.

Standard of Review on Appeals from Masters

18 I have already set out the standard of review applicable to appeals from decisions of masters, first formulated in 1990 in *Abermin* (see para. 9 above). Macdonald J. adopted it as representing the "middle ground" among standards formulated in England and in other Canadian provinces at the time. This "compromise" had been adopted by the Ontario Court of Appeal in *Stoicevski v.*

Casement (1984) 43 O.R. (2d) 436 at 438.

19 I am not aware of any particular problem or inefficiency that has arisen with respect to the *Abermin* standard in the 25 years since masters began to be appointed in the Supreme Court of British Columbia; nor did Mr. Mohan suggest any. However, in a 2011 judgment in *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.* 2011 BCSC 999, the Court suggested that the *Abermin* standard should be replaced by a "clearly wrong" standard applicable to all masters' rulings. This suggestion was said to be consistent with the emphasis of the new *Rules of Court* on proportionality and with the "more deferential approach" to standards of review developed in recent decisions of the Supreme Court of Canada. Fenlon J. in *Ralph's Auto Supply* also pointed out that in Ontario, the Court of Appeal had overruled *Stoicevski v. Casement* in 2009: see *Zeitoun v. Economical Insurance Group* 2009 ONCA 415. She found that the reasons given by the Court of Appeal for "narrowing" the standard of review applicable to masters would apply equally in British Columbia, and expressed her agreement with the observations of the Divisional Court in *Zeitoun* as follows:

> There is ... no compelling reason for adopting differing standards of review on appeal depending solely on the place in the judicial hierarchy occupied by the decision maker whose decision is under appeal. Such an approach is anachronistic and irreconcilable with the presumption of fitness. Rather, similar kinds of decisions and similar kinds of errors ought to be treated similarly, and for that reason, I would hold that where the master has erred in law, the standard of review should be correctness whether the decision be final or interlocutory and whether or not it is vital to the disposition of the lawsuit. The danger in doing otherwise is the potential for the development of straying lines of authority with resulting confusion. [At para. 41, quoted in *Ralph's Auto Supply* at para. 20.]

20 In *Ralph's Auto Supply* itself, of course, the chambers judge was bound to apply the existing standard of review and proceeded to do so. Fenlon J. reversed a master's order that set aside the defendants' pleadings for failure to comply with a disclosure order. The plaintiff sought leave to appeal in this court and leave was refused by Madam Justice Kirkpatrick in chambers. She noted that the issue was moot and of no particular significance to the action, and that the appeal would delay the progress of the action unduly. A division of this court dismissed an application for review, for reasons indexed as 2011 BCCA 523. Speaking for the Court, Mr. Justice Low stated that while the Court might "eventually determine whether a Supreme Court judge reviewing a master's order should apply the *Abermin* standard which has governed for more than twenty years or whether *Housen* [*v. Nikolaisen* [2002] 2 S.C.R. 235] should apply", *Ralph's Auto Supply* was not the case to advance the issue, for the reasons given by Kirkpatrick J.A. Low J.A. continued:

> I do not consider the issue to be of great significance to the practice generally. There is no suggestion that the *Abermin* standard has not served the practice well since it was stated by Mr. Justice Macdonald in 1990, shortly after the masters

> program began in this province. Although the issue has not been before a division of this court, its resolution at this level is not a matter of pressing need. There is no suggestion that there are conflicting decisions in the Supreme Court that need to be reconciled in the interest of consistency of judicial approach. [At para. 15.]

(See also *Nesbitt v. Miramar Mining Corp.* 2000 BCCA 303.)

21 Returning to the case at bar, counsel for the plaintiffs argued that if a master can be "trusted" to make correct findings on interlocutory questions, the same should be true with respect to final rulings. At the same time, he suggested that perhaps masters should be permitted to deal only with certain matters, rather than having co-ordinate jurisdiction with Supreme Court judges in chambers, as provided in s. 11(7) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443, subject to s. 96 of the *Constitution Act, 1867*.

22 Like Low J.A. in *Ralph's Auto Supply*, I am not minded to meddle with a practice that has worked well and, to all appearances, is still working well. Although some may object to a differentiation between masters and judges as representing a hierarchical system, the fact is that the judicial system is hierarchical by its nature and that masters, who are appointed by the Province under the *Supreme Court Act*, are not superior court judges. There will always be a distinction in terms of the authority that may under our Constitution be given to masters. As stated by Judson J. in *Attorney-General for Ontario v. Victoria Medical Building* [1960] S.C.R. 32:

> At first glance, it might be thought that the Legislature, which can authorize a judge to direct a reference in the circumstances mentioned in ss. 67 and 68 of *The Judicature Act*, could decide that in a particular case there should be no need of delegation but a direct assignment of function with a consequent simplification of civil procedure. But I am satisfied, as was the Court of Appeal, that the assignment of the power of final adjudication to the Master goes beyond procedure and amounts to an appointment of a judge under s. 96 of the *British North America Act*. The position of the Master as a referee acting under a judge's order and reporting back to the Court is fundamentally different from his position under the impugned legislation as an independent trier of fact and I think that the Court of Appeal was right in rejecting any analogy between the two positions.
>
> For the same reason, I agree with the Court of Appeal in its decision that s. 31(2) does not save this legislation. ...
>
> While the jurisdiction of the judge is not completely ousted by the Act, it can be sought only if one or other of the litigants chooses to apply for it and it is assumed only in the judge's discretion. This section leaves untouched the

> fundamental objection to the legislation that a grant of original jurisdiction to the Master in a case of this kind cannot stand in view of s. 96. [At 44-5.]

(See also *Bahcheli v. Yorkton Securites Inc.* 2012 ABCA 166 at paras. 12-3.)

23 Since 1989, the masters' program has helped to ease the load on Supreme Court judges with respect to procedural matters. Such matters do not generally require the making of substantive findings of fact. Masters are able to make their decisions quickly and efficiently and in the knowledge that if they are wrong, their decisions can be easily corrected, especially where the decision is "vital to the final issue in the case." Further, as Mr. Godwin submitted, it remains true that various Canadian provinces have adopted different standards of review for masters' decisions. The fact that the Ontario Court of Appeal has chosen one that is different from ours is not in itself a reason for this province to follow suit. (A division of five judges might well be necessary for a change to be made, since this court has approved the *Abermin* standard of review in the past: see *Fat Mel's Restaurant Ltd. v. Cdn. Northern Shield Insur. Co*. (1993) 76 B.C.L.R. (2d) 231 (C.A.) at para. 13; *Chand v. ICBC*, 2009 BCCA 559 at para. 34.)

24 I would not accede to this ground of appeal. I also agree with the chambers judge below that in the circumstances of this case, the application for the withdrawal of the admission was a matter "vital to the final issue" of the case, such that a rehearing was the correct form of appeal.

25 Turning, then, to what I regard as the real issue in this case -- whether the chambers judge erred in concluding that most of the *Hamilton* factors weighed in favour of the defendants -- I would suggest it would be preferable to frame items 3-8 of the *Hamilton* test not as conditions that must be met, but as factors that should be considered in determining what result is in the interests of justice. Thus I would reframe items 3-8 as follows:

> (a) whether the admission was made inadvertently, hastily, or without knowledge of the facts;
>
> (b) whether the "fact" admitted was or was not within the knowledge of the party making the admission;
>
> (c) where the admission is one of fact, whether it is or may be untrue;
>
> (d) whether and to what extent the withdrawal of the admission would prejudice a party; and
>
> (e) whether there has been delay in the application to withdraw the admission

and any reason offered for such delay.

I have omitted item 6 of the original list (that the fact admitted be one of mixed fact and law), since in most cases, including *Hamilton* itself, this has been held to be irrelevant provided a triable issue is raised (see also *Nesbitt* (B.C.S.C.) at para. 56.)

26 The decision as to what is in the interests of justice involves a considerable degree of discretion, and as noted in *Goundar v. Nguyen* 2013 BCCA 251, this court should generally not interfere with such a decision unless the judge erred in principle. In my view, the chambers judge correctly weighed the "delay" factor against the fact that the admission was made without knowledge of the evidence; that the insurer's failure to appreciate the significance of Mr. Hothi's witness statement was a simple oversight; that witnesses to the accident are still available; and most importantly, that if the application were dismissed, the plaintiffs might be perpetrating a fraud on the defendants and on the court. In my opinion, this possibility is one that would be very difficult to countenance. Further, allowing the application will ensure that the plaintiffs' claim will be heard on the merits -- an overarching objective referred to in Rule 1-3 of the new *Supreme Court Civil Rules*.

27 For these reasons, I would dismiss the appeal.

M.V. NEWBURY J.A.
P.D. LOWRY J.A.:-- I agree.
D.F. TYSOE J.A.:-- I agree.