Dewey v. Dawson-Moran, [2011] A.J. No. 97

Alberta Judgments

Alberta Court of Appeal
Edmonton, Alberta
J.E.L. Côté, P.W.L. Martin and F.F. Slatter JJ.A.
Heard: February 3, 2011.
Judgment: February 7, 2011.
Docket: 1003-0295-AC
Registry: Edmonton

[2011] A.J. No. 97 | 2011 ABCA 45 | 502 A.R. 74 | 198 A.C.W.S. (3d) 258 | 2011 CarswellAlta 111

Between Wesley Dewey, Appellant, (Plaintiff), and Jason Dawson-Moran and Tital Logix Corp., Respondents, (Defendants)

(18 paras.)

Case Summary

Civil litigation — Civil procedure — Trials — Jury trials — Appeals — Appeal by plaintiff from order granting defendants' motion for trial by jury allowed — In motor vehicle personal injury action, defendants sought trial by jury, which plaintiff opposed — When motion heard, judge raised preliminary issues, which plaintiff's counsel briefly addressed, and then decided motion without hearing plaintiff's substantive arguments — Chambers judge misunderstood counsel's comments to be his arguments on merit, but counsel had more to say — Although plaintiff had fair chance to lead evidence, as a result of an apparent misunderstanding, he did not give any substantive argument.

Appeal From:

Appeal from the Order by The Honourable Mr. Justice E. Macklin. Dated the 29th day of September, 2010 (Docket: 0503-06203).

Counsel

T.C. Brown, for the Appellant (Plaintiff).

S.L. Miller, Q.C., for the Respondents (Defendants).

Memorandum of Judgment

The following judgment was delivered by

THE COURT

1 We announced in open court that the appeal would be allowed, with written reasons to follow. The reasons are set out below.

2 In a motor vehicle personal injury suit, the respondents defendants sought trial by jury. The appellant plaintiff opposed that idea. The appellant had different counsel in the Court of Queen's Bench than in the Court of Appeal.

3 When the motion came on for hearing, by appointment, in chambers, the judge raised two preliminary points. First, some years before in practice he used to have contact with the deponent of one of the affidavits. No one had any concerns about that; nor did he.

4 The judge also properly criticized the other affidavit, which was sworn by a legal assistant, and exhibited a considerable number of relevant documents. After submissions about that, eventually all concerned were content to ignore the body of that affidavit, but to receive into evidence all its exhibits as authentic. We cannot see that any injustice was done there, and so the appellant's arguments about that fail.

5 However, there is another procedural ground of appeal. Counsel for the appellant says that previous counsel for the appellant lost without the chambers judge ever hearing his substantive arguments.

6 Counsel for the respondents disagrees. She points to several comments in chambers by appellant's then counsel, but we find it impossible to read the earlier ones as offering any substantive argument. In our respectful opinion, only four lines of transcript could possibly contain argument on the merits by the appellant's then counsel. Most of those four lines are incidental; the only possibly substantive statement in them is a bald assertion that the evidence is adequate. The whole passage reads as follows:

> THE COURT: ... Mr. O'Neill, you have heard Ms. Miller. Did you wish to address this presently?
>
> MR. O'NEILL: The preliminary issue? I'm - on reflection, I'm happy to hear it. I think Ms. Costa's affidavit, if in totality not considered by the Court, simply based on the affidavit of Ms. Lefebvre, there's adequate information for this application to be denied, quite frankly, so I'm happy to have you hear it this morning.
>
> (transcript, p. 6, ll. 1-6)

7 Those four lines become clearer in context. Ten steps summarize the order of discussion:

1. Chambers judge's above-described concerns about affidavit and conflict (transcript, pp. 1-2, described above);
2. Answer by respondents' counsel and discussion with appellant's counsel (pp. 2-4), ending in agreement to admit exhibits as evidence;
3. Counsel for respondents concedes some facts and concedes liability for the accident (pp. 4-5);
4. Counsel for respondents briefly argues that jury should try important credibility issues (p. 5, ll. 12-38);
5. Judge asks counsel for appellant if he wishes "to address this presently" (p. 6, l. 1);
6. Four-line reply about "the preliminary issue" quoted above (p. 6, ll. 3-6);
7. Chambers judge's reasons granting jury trial (pp. 6-9);
8. Respondents' counsel's arguments about costs (bottom p. 9);
9. Chambers judge's comments on costs (top p. 10);
10. Counsel for appellant says he cannot add to those comments on costs (p. 10, ll. 14-15).

8 It is true that there was some uncertainty in steps 1 to 5 above. The chambers judge's question (step 5) asked if counsel wished to address the motion "presently". The quoted word we take to mean in due course. Today it rarely means anything sooner.

9 The chambers judge may have thought that the four lines in question (step 6) were the appellant's argument on the merits, but that appears to have been a misunderstanding. Apparently counsel for the appellant had more to say even though counsel for the respondents had conceded complexity and conflicts in expert evidence. And it is still true even after we go over many comments in the transcript which counsel for the respondents suggests were clues showing counsel for the appellant had little or nothing to say. We cannot read them that way. What that counsel had said earlier (step 2) was patently not about the merits of having a jury.

10 What is more, the four lines in question (step 6) opened with an explanation. The appellant's counsel said expressly that he understood that he was being asked if he had more to say on "the preliminary issue". And he said that he agreed that the motion could proceed. Three pages earlier counsel for the respondents had called jury or no jury preliminary, in the sense it would be argued before a possible adjournment was decided. But that appears to us a coincidence. Having a jury or not was the substance of the motion. So the explanation by former counsel for the appellant to the Queen's Bench judge made it clear that he did not think that the time for substantive argument had arrived yet, still less that he was giving it. No one suggested to him that his expressed understanding was wrong.

11 And after the judge had given his reasons (step 7), the judge suggested (step 10) that counsel for the appellant would have no more to say. But that was admittedly all about costs. No cure was attempted by the judge.

12 So the appellant had a fair chance to lead evidence; but as a result of an apparent misunderstanding, he did not give any substantive argument. Authority from other provinces suggests that the result of that on appeal must be a new hearing in the first court: see ***Burlock v. Bethune*** *[1985] 5 W.W.R. 288* (Sask. C.A.); ***Walker-Fairen v. Bulut***, *2010 ONSC 706*, *259 O.A.C. 15* (D.C.) (paras. 17-19); and cases cited in those two cases. See also ***Karamzadeh v. Pierre***, *2010 ONSC 1319*, *[2010] I.L.R. I-4985* (D.C.). Much more authority from other provinces could be cited.

13 In Alberta, binding authority is clear. This Court has held that judgment before counsel gets a chance to present argument takes away his or her client's substantive right to present a case fully, and so is very serious; presumptively it compels a new hearing: ***Wilson v. Guthrie*** (1955) 15 W.W.R. 144 (C.A.). That was quoted and followed in ***R. v. Jahn*** *(1982) 35 A.R. 583*, 591-93 (paras. 22-25) (C.A.). Both were cited and followed in ***Fraser v. Fraser*** *(1994) 157 A.R. 98* (paras. 5-10) (C.A.). Somewhat similar is ***R. v. L.L.C.***, *2003 ABCA 331*, Calg. 0301-0122-A, *[2003] A.J. No. 1384*, [2003] A.U.D. 3653.

14 In theory, counsel for the appellant could have objected as soon as the chambers judge said that he had reached a decision. But the sting may be in reaching a decision, not in the reasons then given. Counsel would have had to react very quickly to an unusual development, interrupt the judge, and try to effect a total reversal of course. See ***R. v. Graham***, *2007 ABCA 153*, *404 A.R. 300* (paras. 13-14), and ***Ladney v. Moore (Twp.)*** *(1984) 46 O.R. (2d) 586*, 588-89 (D.C.). That is often impractical.

15 That alone dictates allowing the appeal and ordering full new argument of the motion in Queen's Bench before a different judge. The same evidence should be used, and the previous arrangement about using the exhibits from the legal assistant's affidavit, but not the body of her affidavit, should stand. So should the concession by the respondents' counsel that

> ... there's a lot of medical evidence that's going to be presented. There's going to be conflicting medical evidence from general practitioners, conflicting medical evidence from psychiatrists, conflicting medical evidence from psychologists and neuropsychologists, conflicting evidence from engineers with respect to the force of the impact ... There's no issue of liability. Our client concedes liability for the accident ... the engineering evidence is going to be with respect to the effect of a seatbelt?

16 For us to express an opinion on the merits of trial by jury here (or on any other ground of appeal not touched on here) would be both unnecessary and undesirable.

17 There was some fault on many sides here, and apparent misunderstanding which was largely no one's fault. The appellant had to appeal, but he raised a number of grounds, so the respondents had to oppose the appeal. Therefore, it seems fairest to let each side bear his own costs in the Court of Appeal.

18 As for costs of the abortive hearing in the Court of Queen's Bench, it may possibly be more closely connected to the result of the trial. The topic is best addressed later in the suit. The trial judge will award costs of that abortive hearing.

J.E.L. CÔTÉ J.A.
P.W.L. MARTIN J.A.
F.F. SLATTER J.A.

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