COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Pearlman v. American Commerce Insurance Company,*** 2009 BCCA 78

Date: 20090224
Docket: CA036378

Between:

David Pearlman

Respondent
(Plaintiff)

And

American Commerce Insurance Company, and Betsy Morrisette

Appellants
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice K. Smith
The Honourable Mr. Justice Frankel

S. H. Stephens — Counsel for the Appellants

Respondent Appearing In Person

Place and Date of Hearing: Vancouver, British Columbia, 8 January 2009

Place and Date of Judgment: Vancouver, British Columbia, 24 February 2009

Written Reasons by:
The Honourable The Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice K. Smith
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION

[1] The defendant, American Commerce Insurance Company (ACIC), appeals from the order of the British Columbia Supreme Court pronounced 13 August 2008 dismissing its application under Rule 18A, *inter alia*, to dismiss the plaintiff's action. The learned summary trial judge held the view that there were "valid questions" concerning the defendant's conduct which he was unable to answer on the material before him. For the reasons which follow, the action should have been dismissed, and I would allow the appeal.

[2] The plaintiff's claim against the defendant arises under a policy of insurance it issued for the period

23 October 2004 to 23 October 2005. The policy was issued in the State of Washington, U.S.A., at a time when the plaintiff resided in Ferndale, Washington. The policy contained a "Personal Injury Protection" (PIP) endorsement for medical and hospital expenses up to a limit of U.S. $10,000, according to the terms specified in the endorsement.

[3] On 25 November 2004 the plaintiff was involved in a motor vehicle accident in Surrey, British Columbia. In this action he alleges that his motor vehicle was struck from behind while it was stopped at an intersection. The other vehicle is alleged to have been owned by Atlantic Trading Co. Limited and driven by Rebecca Lee Spence; it appears that it was insured for third party liability by the Insurance Corporation of British Columbia (ICBC).

[4] The plaintiff alleges that he was injured in that accident.

[5] On 26 September 2006 the plaintiff sued in the British Columbia Supreme Court claiming damages from the other vehicle's owner and driver (Action No. M101344). That action was dismissed following a trial by judge and jury. The plaintiff has brought an appeal from that judgment (CA36501). I will sometimes refer to the plaintiff's claim against the owner and driver of the other vehicle as the "tort action".

II. FACTS

[6] So far as his claim against this defendant, ACIC, is concerned, the following is a brief summary of the facts. The plaintiff notified ACIC of the accident and of his claim for benefits under the policy. On 6 December 2004, ACIC wrote to the plaintiff advising him of the coverage available under the Personal Injury Protection endorsement.

[7] The plaintiff claimed reimbursement for two massage therapy treatments and a protracted course of dental treatment. Most (if not all) of the claims for dental treatment were paid directly to the dentist or dental facility providing that treatment. Between 19 September 2005 and 5 May 2006 the defendant paid expenses totalling U.S. $10,000.

[8] On 5 May 2006, ACIC wrote to the plaintiff advising him that it had paid the maximum limit available under his PIP coverage and that "no further medical payments can be made on your behalf".

[9] On 21 September 2006, the plaintiff wrote to ACIC. He said that he learned from a lawyer representing ICBC that ACIC had "signed a Power of Attorney with the Canadian Council of Insurance Regulators", and that ACIC was accordingly liable to pay medical benefits up to $150,000. ACIC replied on 25 October 2006 to say that it was "researching your questions posed in your September 21, 2006 letter".

[10] The plaintiff responded with a letter on 16 November 2006 in which he accused ACIC of treating him and his dentists badly, delay, and concealing the fact that it had filed a Power of Attorney with Canadian Regulators.

[11] The plaintiff commenced this action on 17 January 2007. Between 20 November 2006 and 20 April 2007 ACIC reimbursed the plaintiff for further expenses he claimed totalling U.S. $825.30. Since then no further expenses have been claimed by the plaintiff under the PIP coverage. In all, ACIC paid a total of U.S. $10,825.30 in respect of medical expenses claimed by the plaintiff under the PIP coverage.

[12] ACIC had indeed filed a "Power of Attorney and Undertaking" in Canada (AR p. 24). By that undertaking, the insurer agreed not to set up a defence to any claim under a motor vehicle insurance contract which it could not set up if the contract had been entered into in the province where an action to enforce the claim was brought. ACIC further agreed in the undertaking to satisfy any such claim up to the minimum coverage for that kind of claim required in the province where the claim was brought.

[13] By virtue of the Power of Attorney and Undertaking, and by the provisions of the Regulations under the ***Insurance (Motor Vehicle) Act*** (now the ***Insurance* (*Vehicle*) *Act***), B.C. Reg. 447/83, the insurer is

obliged to pay medical, dental and similar expenses up to the minimum limit of CDN $150,000.

[14] The evidence before the summary trial judge was that the ACIC claims representative handling the plaintiff's claim had never before come across a "Power of Attorney and Undertaking" or any similar document.

III. THE PLAINTIFF'S ACTION

[15] In the statement of claim, the plaintiff describes himself as a "lawyer", although it does not appear that he is presently a member of either the Law Society of British Columbia or of any other Canadian Law Society. He represented himself before the summary trial judge, and on this appeal.

[16] The plaintiff's statement of claim is 85 paragraphs in length. It is repetitive and disorganized, but it does allege facts that would support a cause of action against ACIC. The statement of claim pleads:

(a) the policy of insurance the defendant issued;

(b) the Power of Attorney and Undertaking filed in Canada;

(c) the motor vehicle accident of 25 November 2004; and

(d) the injuries the plaintiff alleges he suffered in that accident.

[17] The statement of claim further alleges that:

(a) ACIC had a duty to act in good faith, and acted in bad faith;

(b) ACIC has been guilty of "laches and delay";

(c) ACIC has failed to assist the plaintiff in advancing his claim against the motorist who ran into him;

(d) ACIC did not act promptly in handling the expense claims the plaintiff submitted to it;

(e) ACIC has treated the plaintiff with deceit and has defrauded him;

(f) ACIC is in breach of contract, in breach of its responsibilities under the Power of Attorney and Undertaking, and in breach of its statutory obligations;

(g) ACIC was negligent; and

(h) that all of the above have caused the plaintiff loss and expense.

The plaintiff claims damages including punitive, aggravated and exemplary damages.

[18] The plaintiff does acknowledge at paragraph 51 of the statement of claim that the defendant did pay the total sum of U.S. $10,000 "on or about May 5, 2006".

[19] In its amended statement of defence, the defendant admits the policy and the accident, but denies that the plaintiff is entitled to any further benefits beyond what have already been paid. The defendant specifically denies the allegations of fraud, deceit, bad faith, etc.

IV. THE JUDGMENT APPEALED FROM

[20] The defendant made three applications, all of which were heard together on 5 and 6 August 2008. The first notice of motion, filed 4 July 2008, sought an order dismissing the plaintiff's action in its entirety. The second notice of motion, of the same date, sought an order in the alternative that two of the plaintiff's specific claims be dismissed. The third notice of motion, filed 9 July 2008, sought leave to amend the statement of defence. The summary trial judge granted the latter two applications but not the application to dismiss the plaintiff's action altogether. It is only the order dismissing the application to dismiss the action

in its entirety that is the subject of this appeal.

[21] In the reasons for judgment pronounced 13 August 2008 the judge said:

> [9] As for my reasons for not dismissing the plaintiff's action entirely, I will state at the outset that the evidence would probably be sufficient to satisfy me that the defendants have already paid out the benefits that the plaintiff is contractually entitled to in respect to his dental injuries attributable to the accident, and probably more than they are contractually bound to do. It is therefore troubling not to be able to dispose of this action fully in a summary trial to avoid the necessity and expense of what will undoubtedly be a disproportionately expensive trial, but I think it would be somewhat rough justice to dispose of the bad faith and negligence claims in this application. At the end of the day, the evidence tendered does not answer the plaintiff's valid questions about why the defendant American Commerce Insurance Company, as an out of province insurer which had filed a PAU (Power of Attorney and Undertaking) in British Columbia at least as early as 1997, needed to elicit a legal opinion on the mundane issue of policy limit conformity. The affidavit of Ms. Rogers (nee Morrisette) explains her own ignorance in regard to a Power of Attorney and Undertaking, but I do not think that ends the matter. Although a great proportion of the overall delay alleged by the plaintiff is attributable to that matter and only nominal compensatory damages seem conceivable, even if the plaintiff is successful in establishing either bad faith or negligence, I do not feel that I can find all the facts necessary to make a just determination on those claims.
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> [10] Another area of uncertainty or conflict in the evidence surrounds Ms. Morrisette's March 11th, 2005 letter "suspending" the plaintiff's accident benefits. This was a fairly strongly worded letter which Ms. Morrisette provides the following explanation for in ¶14 of her affidavit No. 1.
>
> > Subsequent to having received the requested information, it became apparent that Mr. Pearlman had not provided the names of all relevant health professionals. Mr. Pearlman also refused to record a statement under oath as required by his policy, refused to submit to an independent medical examination ("IME") and refused to provide information in respect to any claim he might have made against the other driver involved in the Accident. As a result, I addressed these issues in a letter to Mr. Pearlman dated March 11, 2005, a copy of which is attached as Exhibit "1".
>
> [11] Mr. Pearlman denies that he refused to record a statement or submit to an independent medical examination and there is no correspondence or other documentation to assist me in assessing the truth of that matter. It appears on the face of the record that the March 11, 2005 letter may actually have been the first notice to the plaintiff of any requirement for a face to face recorded statement, but that is not what is implied in the quoted paragraph 14 of Ms. Morrisette's affidavit. This leads me to think there must be further evidence available on these dealings, or, at least, that cross-examination is necessary.

[22] The judge essentially held that on the Rule 18A trial he could not find the facts necessary to decide the claims of bad faith and negligence advanced by the plaintiff against ACIC, and was therefore obliged by Rule 18A(11)(a)(i) to dismiss the application. This Court has held that such a finding by a chambers judge should only be disturbed if the judge was clearly wrong: *McGregor v. Van Tilborg,* 2005 BCCA 217 at para. 21.

V. ANALYSIS

[23] The issues which appear to have concerned the judge were why the defendant required a legal

opinion on the effect of the Power of Attorney and Undertaking, and whether ACIC provided the plaintiff with adequate notice of its requirements for a recorded statement from the plaintiff under oath, for an independent medical examination and for information in respect of his claim in the tort action against the other motorist. In the judge's view, these areas of "uncertainty or conflict in the evidence" precluded him from finding the facts necessary to decide the claims of bad faith and negligence on a summary trial.

[24] In my respectful opinion, the request by an insurer for legal advice, without more, cannot found a claim based on either bad faith or negligence. The evidence before the judge was that the claims examiner had never previously dealt with a claim involving a "Power of Attorney and Undertaking" or a document of similar effect. As soon as the plaintiff raised the issue by his letter of 21 September 2006, the defendant dealt with it promptly by requesting legal advice, and notified the plaintiff of that step in a letter to him of 25 October 2006.

[25] Before that reply was sent, the plaintiff had already issued the writ and statement of claim in this action on 26 September 2006. He thereafter applied for, and obtained, judgment against the defendant in default of defence. These steps were taken before the defendant had clarified its obligations arising under the Power of Attorney and Undertaking. Once the plaintiff commenced the action against the defendant, it is not surprising that the latter proceeded with caution.

[26] I can see nothing in the record before the judge that would support the allegations of bad faith or negligence. The evidence from the defendant's employees is all to the contrary.

[27] Nor is there anything in the allegation that the defendant concealed the Power of Attorney and Undertaking, or failed to reveal its existence to the plaintiff in a timely way. The PAU is a document readily available to the public. Its existence was known to ICBC, or its legal advisors, which is how it came to the plaintiff's attention in the first place. The evidence before the judge was that it was accessible on the website of the Canadian Council of Insurance Regulators. While it may be unfortunate that the defendant's employee was not familiar with the Power of Attorney and Undertaking and its ramifications, the defendant can hardly be accused of concealing or failing to disclose a document readily accessible on the Internet. Even if fault of any kind could attach to the defendant for its employee's lack of knowledge concerning the PAU, no harm came from that. Although the plaintiff alleges losses attributable to the late disclosure or nondisclosure of the Power of Attorney and Undertaking, there was no evidence before the judge to support any such claim.

[28] In my respectful view, it was plainly wrong for the judge to conclude that he could not find all facts necessary to adjudicate the claims of bad faith or negligence relating to the power of attorney and undertaking.

[29] The second aspect of the claim on which the judge remained in doubt relates to the letter ACIC's claims representative wrote to the plaintiff on 11 March 2005. That letter reads in full:

> With respect to your Personal Injury Protection claim, please be advised that we reserve all of our rights and defenses available to us under your insurance policy number, 11-002294294.
>
> We further notify you that any investigation, settlement, or defense activity which we may undertake on your behalf because of any legal action or actions instituted against you, does not constitute a waiver of our rights.
>
> Under the terms of your insurance policy, our mutual contract, you are required to cooperate with the company's investigation efforts. The intent of this letter is to notify you that your Personal Injury Protection benefits are suspended until you complete a face to face recorded statement and when we have obtained your five years prior dental records. An adjuster will be into [*sic*] contact with you to arrange a meeting for your statement.
>
> Enclosed is a medical authorization form and a provider sheet. Please complete with the information of your prior dentist(s) and return to me in the enclosed postage paid envelope.

> By copy of this letter to your treating provider we are advising of non payment due to suspended benefits.
>
> Please refer to the policy, PART V – DUTIES AFTER AN ACCIDENT OR LOSS
>
> We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:
>
> B. A person seeking any coverage must:
>
> 1. Cooperation [*sic*] with us in the investigation, settlement or defense of any claim or suit.
>
> 3. Submit, as often as we reasonably require:
>
> b. to examination under oath and subscribe the same.
>
> 4. Authorize us to obtain:
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> a. medical reports; and
>
> b. other pertinent records
>
> We are reserving our right to later disclaim any obligation under the policy and assert a defense of no coverage under the policy because you have failed to cooperate with us after the loss in providing information. We will avail ourselves of any other policy defenses which may arise, regardless of whether those defenses are presently known or unknown, or specifically referred to in this letter. All of this company's rights are hereby expressly reserved.
>
> Additionally we need you to provide to us by written correspondence whether or not you have filed a claim with the responsible person's insurance carrier. If you have, please provide the contact information to include name of carrier, claim number, contact name, phone number, and address.
>
> This matter requires your immediate attention. Please sign and return the enclosed copy of this letter where your name appears indicating your receipt of this letter. A self-addressed stamped envelope is enclosed for your convenience.
>
> Should you have any questions with regard to the content of this letter, please contact your personal legal counsel.

[30] The history of exchanges between the plaintiff and the defendant is set out in the claims representative's affidavit filed 4 March 2008. That history shows that prior to the letter of 11 March 2005 the medical information the plaintiff provided to ACIC was incomplete (para. 10). He had only authorized ACIC to obtain medical information up to 12 January 2005. He subsequently forwarded an amended authorization. The claims representative deposed as follows:

> 13. By letter dated February 3, 2005, I informed Mr. Pearlman that we were seeking billing and medical records from his health professionals pursuant to the Amended Authorization and that the same would be reviewed subsequent to which payment and reimbursement would be considered. A copy of the February 3, 2005 letter to Mr. Pearlman is attached as exhibit "H".
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> 14. Subsequent to having received the requested information, it became apparent that Mr. Pearlman had not provided the names of all relevant health professionals. Mr. Pearlman also refused to record a statement under oath as required by his policy, refused to submit to an independent medical examination ("IME") and refused to provide information in respect to any claim he might have made against the other driver involved in the Accident. As a result, I addressed these issues in a letter to Mr. Pearlman dated March 11, 2005, a copy of which is attached as exhibit "I".

[31] The judge records in his reasons (at para. 11) that "Mr. Pearlman denies that he refused to record a statement or submit to an independent medical examination". That denial was apparently an oral assertion made by the plaintiff at the hearing of the Rule 18A trial. There was no affidavit or other evidence to support the plaintiff's assertion. Indeed, as the judge goes on to note, "there is no correspondence or other documentation to assist me in assessing the truth of that matter". Accordingly, the only and uncontradicted evidence before the judge was the claims representative's sworn statement as set out at para. 14 of her affidavit. There was no basis for the judge to refuse to accept that statement of fact.

[32] In any event, whether the letter of 11 March 2005 was the first request for a "face to face recorded statement" from the plaintiff, and whether there was "further evidence available on these dealings", appears to me to be irrelevant to any issue before the judge. The insurer's requirement that its insured comply with the terms of the policy is not evidence of either bad faith or negligence. The history preceding 11 March 2005 amply supports the insurer's cautious stance.

[33] In the proceeding by the plaintiff against ACIC, the latter obtained an independent medical examination of the plaintiff, and a report of 15 July 2008, from Dr. Burton H. Goldstein, a certified oral and maxillofacial surgeon. This report, which was also before the judge, contains an extensive review of the plaintiff's dentition prior to the accident of 25 November 2004, and of the many and various treatments the plaintiff received for his dental problems both before and after the accident. Dr. Goldstein concludes that most, if not all, of the various dental expenses which the plaintiff claimed from the defendant and the defendant paid in full, "were not required because of any injury or injuries suffered by Mr. Pearlman in the MVC [the accident of 4 November 2004], and were related to the patient's pre-existing dental status".

[34] There was no evidence before the judge contradicting this opinion.

[35] In short, whether there was, as the judge suggested, further evidence available concerning the defendant's request for compliance with the terms of the insurance coverage, it could not have advanced the plaintiff's position. The defendant has paid out a total of U.S. $10,825.30 for dental expenses for which it was, on the only evidence available, not liable under the terms of the coverage. There is no evidence whatsoever that the insurer failed to act in good faith throughout or that it acted with anything less than the requisite degree of care for the plaintiff's interests in the processing of his claim. There is absolutely no evidence to support the allegations of deceit, fraud, abuse of process or misrepresentation.

[36] In my respectful view, on all of the evidence contained in this record, all of the facts necessary to support the defendant's application for dismissal of the plaintiff's action could have been found, and it would not in any way have been unjust for the judge to do so. The defendant's application was for judgment on summary trial under Rule 18A, and it was entitled to have the action dismissed.

[37] I would allow the appeal and vary paragraph 1 of the order of 13 August 2008 to read:

1. The defendant's application of 4 July 2008 to dismiss the plaintiff's action is granted, and the action is dismissed.

[38] The defendant is entitled to the costs of this appeal. The plaintiff's approval as to the form of this order is dispensed with.

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice K. Smith"

I agree:

"The Honourable Mr. Justice Frankel"