Davies v. Clarington (Municipality), [2015] O.J. No. 3599

Ontario Judgments

Ontario Superior Court of Justice

Oshawa, Ontario

M.L. Edwards J.

Heard: June 4, 2015.

Oral judgment: June 4, 2015.

Court File No.: 1075/00

[2015] O.J. No. 3599 | 2015 ONSC 3805

Between Bonnie Davies, Plaintiff, and The Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment INC., Apache Transportation Services Inc., Blue Circle Canada INC., and Hydro One Networks Inc., Defendants

(28 paras.)

Case Summary

Civil litigation — Evidence — Civil evidence — Documentary evidence — Witnesses — Examination — Cross-examination — Motion by the defence to cross-examine the plaintiff on documents that would call into question his sworn evidence that he had no criminal record in Poland and had never been found guilty of a criminal offence allowed — Although documents were not certified copies, plaintiff would have a full opportunity to confirm, deny or explain information contained in the documents — At this stage, the defence was entitled to cross-examine the plaintiff on an issue that he raised in-chief.

Motion by the defence to cross-examine the plaintiff on documents that would call into question his sworn evidence that he had no criminal record and had never been found guilty of a criminal offence. The plaintiff sued for personal injuries suffered as a result of a 1999 train derailment. The plaintiff, a resident of Poland, testified to multiple injuries that left him unable to work. Prior to the accident, he alleged that he was a consultant earning substantial sums of money. Much of the income that he earned pre-accident was paid to him in cash. As part of the plaintiff's evidence in-chief, he had chosen to place his character into evidence by filing evidence that, on its face, indicated that he had no criminal record in Poland.

HELD: Motion allowed.

Although the documents were not certified copies, the plaintiff would have a full opportunity to confirm, deny or explain the information contained in the documents. The plaintiff would have the opportunity to establish that the documents failed to reach the level of reliability which would be fundamental to the admissibility of the documents into evidence. At this stage, the defence was entitled to cross-examine the plaintiff on an issue that he raised in-chief. The plaintiff chose to make his reputation and character an issue and did so in part when he chose to make his criminal record, or lack thereof, an issue. His credibility was fundamental to the eventual outcome in this case.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, *R.S.C. 1985, c. C-5, s. 12*, s. 23

Counsel

J. Strype, Counsel for the Plaintiff, Christopher Zuber.

K. Smith, Counsel for the Plaintiff, Christopher Zuber.

D. Merner, Counsel for the Defendants, Via Rail Canada Inc., and Canadian National Railway Company.

J. Regan, Counsel for the Defendants, Timothy Garnham, Apache Specialized Equipment Inc., and Apache Transportation Services Inc.

A. Sciacca, Counsel for the Defendants, Timothy Garnham, Apache Specialized Equipment Inc., and Apache Transportation Services Inc.

A. Barda, Counsel for the Defendants, The BLM Group Inc.

S. MacDonald, Counsel for the Defendant, Ontario Hydro Services Companys.

W. Pollard, Counsel for the Defendant, Ontario Hydro Services Companys.

REASONS FOR RULING

M.L. EDWARDS J. (orally)

1 Mr. Zuber was a passenger in a Via rail train that derailed November, 1999.

2 MR. STRYPE: Your Honour.

3 THE COURT: A class action was commenced...

4 MR. STRYPE: Do you want Mr. Zuber in or out of the courtroom?

5 THE COURT: It doesn't matter.

6 MR. STRYPE: Okay.

7 THE COURT: The class action was commenced in early 2000. The action was certified on August 30th, 2000 by Justice MacKinnon. Mr. Zuber chose to opt out of the class and is now pursuing his claim for damages independent of the class.

8 Mr. Zuber is a citizen of Poland. He resides in Poland. I have heard Mr. Zuber's evidence in-chief over the last 12 days. Mr. Zuber has testified to multiple injuries that have left him unable to work. Prior to the accident, Mr. Zuber was a consultant earning substantial sums of money. Much of the income that he earned pre-accident was paid to

him in cash. The defence will argue, based on submissions that I have heard to date, that there is a marked absence of documentary evidence to corroborate the income that Mr. Zuber says he was earning pre-accident. I make no comment at this stage with respect to the evidence that I have heard so far, other than to note the obvious and that is that Mr. Zuber's credibility will be fundamental to the outcome in this case.

9 As part of Mr. Zuber's evidence in-chief, he has chosen to place his character into evidence. He has done this in part by filing with the court evidence that, on its face, says that he has no criminal record in Poland. His character is therefore, in my view, not a collateral issue. It is not disputed that the defence is entitled to challenge Mr. Zuber's good character now that he has made it an issue in-chief.

10 The defence seeks to cross-examine Mr. Zuber on documents that the defence says will call into question Mr. Zuber's sworn evidence that he has:

(a) no criminal record; and

(b) has never been found guilty of any criminal offence.

11 In support of that evidence from Mr. Zuber, Mr. Strype filed as an exhibit, documents that on their face corroborate Mr. Zuber's evidence. Specifically, Exhibit 130 consists of two documents in Polish which, translated into English, are entitled "Ministry of Justice Information Bureau of National Register of Convicted Persons, Criminal Record Inquiry" and, secondly, "Request for Release of Original Case File Documents." The Polish documents have been translated and they have been certified by both Polish authorities and by the Canadian Consulate Office in Warsaw, Poland, Exhibit 130 was prepared in October 2014 and states in response to the request for a criminal record enquiry, "Not on Record."

12 At this stage in the proceedings, I have heard no evidence on the law of Poland as it relates to a criminal record and how, if at all, a criminal record can be expunged. I simply note in respect to Exhibit 130 that the response to the question posed of whether Mr. Zuber has a criminal record, the answer was "Not on Record." It does not confirm that Mr. Zuber has never been convicted of a criminal offence. This may, or it may not, become an issue as this trial unfolds.

13 The documents which Mr. Regan seeks to use in his cross-examination of Mr. Zuber are as follows:

(a) Notarized conviction, November 12, 1998;

(b) Amended Conviction and Court cover letter, May 27, 2010;

(c) Motion in a slander case, August 6, 2007, involving his ex-wife;

(d) Court testimony, January 8, 2008;

(e) Decision on Slander, June 16, 2010;

(f) Court testimony, June 21 and September 12, 2011; and

(g) Court judgment, March 8, 2013 and July 20, 2013.

14 I will collectively refer to all of these documents as "the documents" unless I make reference to a specific document.

15 Mr. Strype's initial position was that these documents were not certified and therefore they were inadmissible under s.23 of the *Canada Evidence Act*. Mr. Strype also argues that the documents fly in the face of Exhibit 130, which he says is unassailable as it confirms Mr. Zuber's evidence that he has no criminal record. Exhibit 130 is, according to Mr. Strype, an official record from Poland that confirms Mr. Zuber has no criminal record and that none of the documents which the defence wishes to use in cross-examination are certified and therefore cannot contradict the official nature of Exhibit 130.

16 Mr. Strype also noted in his argument that he will be calling Andrzej Kalwas, who is a Polish lawyer and who was the Polish Minister of Justice between 2004 and 2005. Mr. Kalwas will, amongst other things, confirm Mr. Zuber's good reputation in the Polish business community but, most importantly, will also confirm Mr. Zuber, and I quote, "...has not had nor does he presently have, any criminal record in Poland..." (See paragraph 3 of Mr. Kalwas' translated affidavit sworn on May 19, 2015.)

17 The defence takes the position that as a matter of fairness, they should be entitled to cross-examine Mr. Zuber on his assertion that he has no criminal record and that, at this stage of the trial, I only have to determine whether the documents meet threshold reliability and whether they are necessary. I do not have to decide if the documents meet the ultimate test of reliability.

18 Dealing with the issue raised by Mr. Strype that the documents are inadmissible as they are not certified and thus do not meet the requirements of s.23 of the *Canada Evidence Act*, it is worth repeating s.23, which provides, and I quote:

> Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, any court in a province, any court in a British colony or possession or any court of record of the United States, of a state of the United States or of any country, or before any justice of the peace or coroner in a province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record...

19 Section 23 is permissive in its language. It permits evidence of a court proceeding of any foreign country by filing an exemplification or certified copy of the proceeding. In essence, s.23 provides an expeditious means to admit evidence of a foreign court record. What s.23 does not do is prevent the proof of a foreign country's court record through some other means available at common law. My determination in this regard is reinforced by the use of the word "may" in s.23, as well as the comments of the Court of Appeal in R. v. P.(A.) *(1996), 109 C.C.C. (3d) 385*, where at page 388, Laskin J.A. (as he then was) stated, and I quote:

> Section 23 of the *Canada Evidence Act*, specifically addresses the admissibility in evidence of court documents from previous judicial proceedings. But s.23 is not the only possible basis for their admissibility. Court documents may be proved at common law or by resorting to an applicable provision of another statute. These two possibilities are expressly provided for in s.36 of the *Canada Evidence Act* and are confirmed by the case law...

20 As to the admissibility of public documents, Laskin J.A. at page 389 made the following comments, and I quote:

> At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly." Sopinka *et al.* The Law of Evidence in Canada 2nd ed. p.231. Public documents are admissible without proof because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in court to prove them...

21 After a review of the authorities, Laskin J.A. then suggested the following criteria for the admissibility of a public document without proof at page 390, and I quote:

> A "public document" means "... a document that is made for the purpose of the public making use of it, and being able to refer to it:" Sturla v. Freccia (1880), 5 App. Cas. 623 (H.L.) at 643. English and Canadian cases have generally prescribed four criteria for the admissibility of a public document without proof [and they are as follows]:
>
> (i) the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;

(ii) the public official must have made the document in the discharge of a public duty or function;

(iii) the document must have been made with the intention that it serve as a permanent record, and

(iv) the document must be available for public inspection.

22 The Court of Appeal, in a more recent decision addressing the application of s.23 commented in R. v. C.(W.B.) *2000, 142 C.C.C. (3rd) 490* at page 503 as follows, and I quote:

> Section 36 of the *Canada Evidence Act* provides that Part I, which includes ss. 23 and 28, is in addition to, and not in derogation of, any powers to prove documents "existing at law". This includes the power to prove documents at common law: R. v. Tatomir *[1989] A.J. No. 843* . Thus, the *Canada Evidence Act* is not an exclusive code with respect to proof of documents.

23 The Court of Appeal then went on to deal with the issues of reliability and necessity and quoted, with approval, the comments of Laskin J.A. in R. v. P.(A.) that I have set forth above, and further stated at paragraphs 38 and 39 as follows:

> 38. A further requirement at common law that relates to reliability is the principle that the whole document must be submitted to the court...;

24 And, at paragraph 39, I quote:

> 39. Another aspect of reliability is the need to establish the authenticity of the document. To be admissible at common law, the judicial document in question must be: (1) the original record; or (2) an exemplification of that record under the seal of the court...

25 For the purposes of cross-examination, I am not satisfied that the absence of a certified copy or exemplification required by s.23 precludes the use of the documents in cross-examination. The documents have been in the possession of Mr. Strype since the fall of last year. Mr. Zuber will have a full opportunity to confirm, deny or explain the information contained in the documents. Mr. Strype will have the opportunity, as part of his case, to establish that the documents fail to reach the level of reliability which, at the end of the day, will be fundamental to the admissibility of the documents into evidence. At this stage, the defence is entitled to cross-examine Mr. Zuber on an issue that he raised in-chief.

26 As well as having placed his character and reputation in issue, s.12 of the *Canada Evidence Act* provides that a witness may be questioned as to whether he has been convicted of any offence and, if he denies the fact, the opposite party may prove such a conviction. Section 12 is not restricted to a criminal conviction in Canada. This was made clear by the Court of Appeal in R. v Stratton (1978), O.J. No 3536, where at paras. 29 through 32, Martin J.A. stated, and I quote:

> In a world in which modern technology has made possible rapid communication and movement between countries it would be highly artificial, however, to exclude the use of all foreign convictions for the purpose of impeaching the credibility of a witness under s.12, and I do not find any indication that Parliament intended to do so. In complex crimes, substantial elements of the offence may occur in more than one country, each of which might have concurrent jurisdiction over the offence under the principles of international law governing jurisdiction of a crime. In those circumstances it might, in a particular case, be largely a matter of chance in which country the offender was prosecuted. It was strongly urged in support of the appellant's contention, the provisions of s.12(1) apply only to Canadian convictions, that the procedure set out in s.12(2) for proving the conviction if the witness denies the fact is applicable to domestic convictions only. In my view, however, s.12(2) does not provide an exclusive method of proving previous convictions, and a conviction in another country may be proved in any way in which a foreign conviction they've strictly proved as, for example, under s.23 of the *Canada Evidence Act*. I would, in this respect,

> adopt the reasoning of this court in R. v Blackstock *(1950), 97 C.C.C. 201*. 'Accordingly, I am of the view that the trial judge did not err in permitting Crown counsel to cross-examine the appellant with respect to previous convictions in England and Denmark.'

27 Fundamentally a trial, whether it is a criminal trial or a civil trial, has as one of its core purposes the search for the truth. In seeking the truth, the court must ensure there is fairness to both sides. Mr. Zuber chose to make his reputation and character an issue and did so in part when he chose to make his criminal record, or lack thereof, an issue with the filing of Exhibit 130. Mr. Zuber's credibility is fundamental to the eventual outcome in this case. As Justice Pratte stated in R. v. Morris *[1979] 1 S.C.R. 405* at page 20, "...Cross-examination would become pointless if it were not available to attempt to prove the falsity of the evidence given in-chief..."

28 Mr. Strype argues the defence should not be allowed to use the documents to cross-examine Mr. Zuber as they are not certified copies, nor are they exemplifications. Moreover, they fly in the face of what is an official certified Polish court record, that is, Exhibit 130. This is a somewhat unique case in that much of what transpired from 1999 to date occurred in Poland and other European countries where this court clearly has no jurisdiction. I have been referred to no other case where in a civil context one side sought to impeach the other side on the basis of a criminal record from a foreign jurisdiction. That said, clearly Justice Martin accepted that this was a proper area of cross-examination even back in 1978 when the means of communication were nothing like they are today. We are at a stage in this trial where Mr. Zuber and his counsel will have ample time to marshal their evidence to show that the documents that the defence seeks to use in cross-examination do not meet the actual test for reliability and therefore are not admissible into evidence. What is particularly telling at this stage of the case is that despite having had the documents since the fall of 2014, Mr. Strype, to his credit, did not argue that the documents were false. I find this particularly telling in favour of allowing the defence to use the documents in the cross-examination of Mr. Zuber.

End of Document