Davies v. Clarington (Municipality), [2015] O.J. No. 6145

Ontario Judgments

Ontario Superior Court of Justice

M.L. Edwards J.

Heard: October 7, 2015.

Judgment: November 25, 2015.

Oshawa Court File No.: 1075/2000

[2015] O.J. No. 6145 | 2015 ONSC 7353 | 85 C.P.C. (7th) 183 | 261 A.C.W.S. (3d) 114 | 2015 CarswellOnt 17929

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 Transportation Services Inc., Blue Circle Canada Inc., and Hydro One Networks Inc., Defendants

(46 paras.)

Case Summary

Civil litigation — Civil evidence — Witnesses — Testimony by video or telephone conference — Motion by defendants for order requiring proposed overseas witnesses to testify in person dismissed — Plaintiff was train passenger who sought damages for injuries suffered in derailment — Credibility dispute arose regarding claim for past and future lost income — Plaintiff was CEO of Polish company who sought to call Polish witnesses to testify through video link or affidavit to prove his income — Balance of convenience favoured video conference testimony, which would not impact ability to make credibility determinations — Plaintiff was not precluded from calling more detailed evidence than contained in previously disclosed will-says — Ontario Rules of Civil Procedure, Rule 1.08.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 1.08

Counsel

Jeffrey W. Strype and Kyle Smith, for Class Member Zuber.

James M. Regan, Q.C. and Angelo Sciacca, for the Defendants, Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Timothy Garnham.

Weston Pollard, for the Defendant Hydro One Networks Inc.

David Merner, for the Defendants VIA Rail Canada Inc. and Canadian National Railway Company.

Alon Barda, for the Defendant BLM Group Inc.

REASONS

M.L. EDWARDS J.

Overview

1 The trial in this matter commenced during the November 2014 sittings and essentially involves an assessment of the plaintiff's damages arising out of injuries that occurred when the plaintiff, Christopher Zuber (Zuber), was a passenger on an eastbound VIA train that was derailed in an accident on November 23, 1999.

2 The plaintiff has testified in-chief and is in the middle of cross-examination. It is readily apparent, from the evidence that I have heard so far, that there is a serious dispute with respect to the credibility of the plaintiff's claim for past and future loss of income.

3 At the time of the accident Zuber was the CEO of a Polish company, Bastion Consulting Group, which would appear to be a loosely affiliated group of a number of companies that Zuber created. While I have not heard all of the evidence, nor have I heard any of the expert evidence, it is readily apparent that if Zuber's evidence is accepted, he may have been earning a substantial income that it is now alleged he can no longer earn because of the injuries suffered in the accident. The income that he was earning was, in many respects, paid to him in cash. There are issues with respect to the ability of the plaintiff to prove his loss of income given the absence of supporting documentation.

4 In order to prove the income that he was earning both prior to the accident and subsequent to the accident, plaintiff's counsel has indicated that he intends to call a number of witnesses from Poland who, it is suggested, will substantiate the claims made by Zuber in this trial.

5 For various reasons many of the witnesses that the plaintiff wishes to call have indicated they will not come to an Ontario courtroom to present their evidence, as they would otherwise do, if they were resident here in Canada.

6 There are, therefore, two motions before me which are mid-trial motions by the defendants for the following orders:

a) that the witnesses identified in the defendants' motion record be required to give *viva voce* evidence in Canada if called by Zuber; and

b) that Zuber be permitted to only lead evidence that was disclosed prior to trial in compliance with an Order that had been made by Lauwers J. dated November 2, 2010.

Position of the Defendants

7 The defendants argue that witnesses whom the plaintiff wishes to call, by way of a video link with Poland, will give evidence on large sums of money that were allegedly earned by Zuber and paid to him in cash. It is argued that there is no documentary trail to corroborate these claims, and that the credibility of the witnesses is central to the proof which requires the court to have the benefit of observing the demeanour of the witnesses in person.

8 The defendants argue that Rule 1.08 of the *Rules of Civil Procedure* (The *Rules*), which provides for video conferencing, provides an exception to the principle that all *viva voce* evidence must be heard in the jurisdiction where the court is located. It is argued that Zuber has the onus of proving on a witness by witness basis that a

witness may be exempt from the general principle of having to testify in person, in court, as opposed to by way of video conference.

9 With respect to the second aspect of the motion dealing with limiting the plaintiff to the evidence disclosed pursuant to the Order of Justice Lauwers dated November 2, 2010, the continued discoveries took place in June 2012 and, it is argued by the defence, that subsequent to those examinations Zuber produced detailed will-say statements and sworn affidavits that, it is argued, fundamentally changed the nature of his claim. Because the defendants did not have an opportunity to discover on this new evidence, it is argued that the defendants are prejudiced in such a way that the only remedy that is appropriate is to limit the plaintiff to the evidence that was disclosed in compliance with the Order of Lauwers J.

Position of the Plaintiff, Mr. Zuber

10 Plaintiff's counsel, in his factum, notes that many of the witnesses over which there was a dispute in terms of whether they would have to testify in person or by way of video-conference has now been resolved, and that in fact the witnesses over which there is a dispute is limited to a total of 14 witnesses, all of whom reside in either Poland, Russia or the Ukraine.

11 It is noted by plaintiff's counsel, in his factum, that the question of video conferencing has already been addressed by this court, in part, when the issue came before me in September 2014 to deal with the question of whether or not the video conferencing system would in fact work. At that time a demonstration showing how the video conferencing would work occurred in Oshawa and I was satisfied with the quality of the video and audio. The motion therefore, before me, is not a motion that needs to deal with whether video conferencing facilities are available which will work. Rather, the issue is whether or not the court should exercise its discretion under Rule 1.08 to allow the 14 witnesses in dispute to testify by way of video conference.

12 Having heard much of Zuber's evidence at this point in the trial, it is apparent that if Zuber's evidence is accepted he is presently financially unable to fund the cost of bringing the disputed witnesses to attend trial in Oshawa. Furthermore, the witnesses in question have all provided evidence in the form of email correspondence confirming that they are unwilling to travel to Canada to testify.

13 Dealing with the second aspect of the defendants' motion, the effect of which would be to limit the plaintiff's evidence to the evidence disclosed in accordance with the Order of Lauwers J., it is argued on behalf of Zuber that to limit the plaintiff's evidence in that regard would be to exclude relevant and probative evidence.

14 Plaintiff's counsel notes that prior to the June 2012 continued examinations for discovery, the plaintiff had provided the defendants with 46 will-say statements. It is acknowledged that the plaintiff, subsequent to the June 2012 discoveries, provided a further 48 will-say statements which, it is suggested, are essentially updates to existing will-say statements.

15 Plaintiff's counsel notes in his factum that:

> With the passage of time, further information came to light, and the plaintiff disclosed it as soon as they practically could. Some of the witnesses could not or would not talk about certain matters when initial will-say statements were taken, as they involved ongoing projects. The pipeline evidence is a prime example of this, where the witnesses simply would not or could not provide details of the project as it was still an ongoing project. The plaintiff is only able to get these witnesses to discuss these matters now that the information is no longer as sensitive.

16 Quite correctly, in my view, plaintiff's counsel notes in his written submissions that as a result of a case management Order that I made in November 2014, the plaintiffs have prepared affidavits for the various witnesses who will be testifying on behalf of the plaintiff. These affidavits will form the evidence in-chief of these witnesses at

trial. Pursuant to the Order that I made, the plaintiff will call the various witnesses by filing the affidavit of the witness and the witness will then be tendered for cross-examination.

17 As a matter of common sense then, the affidavit of these witnesses may very well reflect a not insignificant expansion of the information contained in a will-say statement that would have been produced by the plaintiff to comply with the Order of Lauwers J.

18 Plaintiff's counsel argues that it would be unrealistic to expect will-say statements at the time of an examination for discovery would contain every piece of relevant evidence in the knowledge of any particular witness.

Video Conferencing

19 The plaintiff relies on Rule 1.08 of the *Rules*, which provides:

> (1) If facilities for a telephone or video conference are available at the court or are provided by a party, all or part of any of the following proceedings or steps in a proceeding may be heard or conducted by telephone or video conferences as permitted by subrules (2) to (5).

20 Mr. Regan, who took the lead in arguing this motion on behalf of the defendants, argues that the use of video conferencing should not be available to parties in a civil action as a matter of right and that fundamentally, when the court allows evidence to be taken outside of a courtroom in a foreign language, the court loses the ability to properly assess credibility.

21 Mr. Regan argues that many of the disputed witnesses will provide evidence of Zuber's alleged economic loss with respect to so-called business transactions, for which it is alleged that significant sums of money were paid to Zuber in cash. Mr. Regan notes that the documentary evidence that would normally be tendered to prove such transactions is not available and, as such, the credibility of these witnesses is central to the proof of the transactions and payments which Zuber alleges as the foundation for his loss of income claim. Mr. Regan argues that this court should have the opportunity to observe the demeanor of these critical witnesses in person.

22 Mr. Regan also argues, in part, that to allow a witness to testify by way of video conference detracts from the "Majesty of the Courtroom", and the impact that the presence within the courtroom might have upon the evidence that the witness might give by way of video conference.

23 In my view, the answer to the concerns raised in part by Mr. Regan must be found not only in the discretion that the court is given to allow video conferencing by way of the application of Rule 1.08, but also the guidance that the Supreme Court of Canada has recently given in *Hryniak v. Mauldin*, *2014 SCC 7*. Apart from the specific application of *Hryniak* to motions for summary judgment, the Supreme Court is clearly signalling that there must be a cultural shift away from the traditional trial in favour of modern procedures that meet the needs of any particular case.

24 There are a number of decisions from this and other courts that have positively endorsed the use of video technology to reduce the costs of litigation. In that regard, the comments of Rutherford J. in *Pack All Manufacturing Inc. v. Triad Plastics Inc.*, *[2001] O.J. No. 5882*, at paragraph six, are of particular interest given that these comments were made 15 years ago:

> In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conference arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House. The demeanour of the witness can be observed, although perhaps not the full body, but then, sitting in a witness box is not significantly better in this regard. Indeed, I often wonder whether too much isn't made of the possible ability to assess the credibility of a witness from the way a witness appears while giving evidence. Doubtless there are "body

> language" clues which, if properly interpreted, may add to the totality of one's human judgment as to the credibility of an account given by a witness. The danger lies in misinterpreting such "body language", taking nervousness for uncertainty or insincerity, for example, or shyness and hesitation for doubt. An apparent boldness or assertiveness may be mistaken for candour and knowledge while it may merely be a developed technique designed for persuasion. Much more important is how the substance of a witness' evidence coincides logically, or naturally, with what appears beyond dispute, either from proven facts or deduced likelihood. I am not at all certain that much weight can or should be placed on the advantage a trier of fact will derive from having a witness live and in person in the witness box as opposed to on a good quality, decent sized colour monitor in a video-conference. While perhaps a presumption of some benefit goes to the live, in person appearance, it is arguable that some witnesses may perform more capably and feel under less pressure in a local video-conference with fewer strangers present and no journeying to be done.

25 The Supreme Court of Canada has, in my view, sent a very clear message that it supports the move from conventional courtroom procedure imposed by traditional design into more modern and flexible approaches tailored to the needs of a particular case. In *Hryniak*, the court recognized that to create an environment that promotes efficient, affordable and participatory access to justice requires modern methods of adjudication. Implicitly, those modern methods of adjudication include video technology in the courtroom.

26 As well, the comments of Mew J. in *Chandra v. CBC et al.,* *2015 ONSC 5385*, are helpful insofar as he not only reviews the law with respect to video conferencing, but also his experience in conducting a trial with video conferencing. At paragraph 29, Mew J. noted:

> The picture and sound quality were excellent. Counsel and the court registrar were able to efficiently manage the process. The flow of testimony was not markedly less spontaneous than it would have been if the witness had been present in court. The entire experience was, from the perspective of this trial judge, entirely satisfactory. The fears expressed by the plaintiff in opposing the CBC's motion were, in my view, entirely unfounded.

27 Video conferencing, not surprisingly, is not unique to Canada. This court can look to the experience of what has been happening in England. In *Polanski v. Conde Nast Publications Ltd.,* [2003] EWCA Civ 1573, rev'd [2005] UKHL 10, Lord Justice Parker, at paragraph 60, stated:

> The improvements in technology are such that, in my recent experience as a trial judge, the giving of evidence by [video conference facilities] VCF has become by 2003 a readily acceptable alternative to giving evidence in person, provided there is a sufficient reason for departing from the normal rule that witnesses give evidence in person before the court. In the ordinary run of a case, a sufficient reason may easily be shown. If there is sufficient reason, then even in cases where the allegations are grave and the consequences to the parties serious, the giving of evidence by VCF is now an entirely satisfactory means of giving evidence in such cases.

28 In addition to drawing on the experience in Great Britain, it is notable that Canadian courts have also adopted a positive approach to the application of video evidence not just in civil actions but also in criminal proceedings. In *R. v. Turner*, *2002 BCSC 1135*, the Crown brought an application to permit a witness to testify via video link. Pursuant to the provisions of section 714.1 of the *Criminal Code*, a court shall receive evidence given by a witness outside Canada by means of technology that permits the witness to testify in the virtual presence of the parties, unless one of the parties satisfies the court that the reception of video testimony would not be appropriate. The motion by the Crown was resisted by defence counsel on the basis that assessment of credibility by means of video link is difficult. As well, it was argued that it is difficult to ensure the witness appreciates the nature of the oath; and the accused's right to a fair and unbiased trial may be adversely impacted by breaks in testimony, particularly if the witness discusses evidence with another person. In allowing the Crown's application, MacAulay J. stated at paragraph 12:

> As to the assessment of credibility, sometimes members of the public, lawyers and perhaps even judges make the mistake of concluding that the assessment of credibility depends on observations of physical demeanour during the course of the witness testifying. In my experience, those observations are rarely determinative of credibility, as a judge who relies solely on physical observations of demeanour is likely to err.

29 A similar result was found in *R. v. Denham*, *2010 ABPC 82*, a decision of the Alberta Provincial Court, which also addressed section 714.1 of the *Criminal Code* and considered the decision of MacAulay J. in *Turner.* In *Denham*, it was noted that there was a growing international trend towards the use of video technology for the administration of justice, and that only where the use of video link would be inappropriate should the court decline the order allowing video evidence.

30 In the case that I am deciding much of the objection taken by the defence, to the use of video technology with respect to the witnesses that are in dispute, relate to the ability of this court to assess credibility. This is particularly so with respect to the credibility of the plaintiff's claim for loss of income, which is largely dependent upon the evidence that he is going to call to support the evidence that he has already given to the court in-chief and cross-examination. The difficulty with this argument, at least in part, relates to a misunderstanding that the assessment of credibility based on observations of physical demeanour during a witness' testimony is rarely determinative of credibility, and that a judge who relies solely on physical observations of demeanour will likely fall into error.

31 In *Wright v. Wasilewski*, *2001 CanLII 28026*, a personal injury action, Master Albert permitted 20 witnesses, including medical experts to give evidence by way of video conference, and stated:

> Video conferencing is an interactive technology. It is conducted in real time. The witness is able to see and hear what is going on in the courtroom. Those in the courtroom in Toronto are able to see and hear the witness "live". Questions can be asked and answered. Examination in-chief, cross-examinations and re-direct examination could be conducted live, though not in person...Evidence presented by video conferencing gives the trier of fact an opportunity to observe the demeanour of the witness and hear the inflections of voice and other visual and verbal cues that are part of oral testimony.

32 Some may argue that evidence provided by way of video conferencing in this digital age is not only as good as having the witness in the courtroom, but in some circumstance may be even better. That said, in assessing the credibility of a witness the demeanour of the witness may be, whether it is in court or by video conference, only one of many factors in the overall assessment of a witness' credibility. It is the substance of the evidence that must be the focus of the consideration by which the assessment is made based on reason and common sense.

33 The proper approach in the assessment of a witness is to consider the evidence of the witness against the backdrop of the evidence lead in court, which will assist in making the connections allowing for the corroboration between witnesses. The demeanour of the witness is simply one part of the overall assessment of the credibility of a witness. It is not by any means the sole determining factor.

34 I have had an opportunity to test-run the video conferencing facilities that will be used in Poland and in Oshawa. To this point in time, I am satisfied that those video conferencing facilities will provide this court with a more than adequate means by which to hear and see the evidence of a witness. In the event that for some reason the video conferencing facilities do not live up to what was demonstrated in the dry-run, then this court would have to revisit the viability of the video conferencing for the witnesses that are proposed by the plaintiff.

35 Applying the principles set forth in Rule 1.08, I am satisfied that the effect of the video conference will not impact on the ability of the court to make findings and determinations about the credibility of a witness. I am also satisfied that the importance of the witnesses in question are such that this court should exercise its discretion in favour of the plaintiff. I am satisfied that the plaintiff has presented sufficient evidence to establish that the witnesses in question will not attend in Oshawa to give their evidence in court, and that the balance of convenience, therefore, is in favour of allowing the evidence of these witnesses by way of video conferencing.

36 As to the mechanics of how the video conferencing will take place, as I indicated to the parties when this matter was argued, the witnesses who will largely be testifying in Polish will be testifying with the assistance of an interpreter. The interpreter will be sworn in the courtroom in Oshawa, and shall be physically present in the courtroom in Oshawa as the evidence is being translated. The translator shall be a court certified translator.

37 An issue has been raised with respect to the parties having a representative in the conference room in Poland where the witness is testifying. The parties shall be at liberty to have a representative physically present in the conference room in Poland for the purposes of ensuring that any order made by this court is complied with. In that regard, there is an order of the court as it presently stands excluding witnesses, and it will be incumbent upon counsel to ensure that the order excluding witnesses applies to the witnesses in Poland. Any issue with respect to the application of any order made by this court, including the exclusion order, may be brought to the court's attention at the appropriate time.

38 A request was made by defence counsel that any witness testifying by video conference must identify themselves with two pieces of identification. When a witness testifies in court here in Ontario, there is no obligation on that witness to present identification. The witness identifies himself by name and is then sworn. If any of the disputed witnesses were to testify in Oshawa, they would not be asked for identification. Under the circumstances, I am not exercising my discretion to require the witnesses testifying by video conference in Poland to produce the two pieces of photo identification suggested by defence counsel. If there is any dispute between the parties as to the identity of a witness I will have to deal with that as it materializes.

Should Mr. Zuber be Permitted to Lead Evidence Not Disclosed in Compliance with the Order of Lauwers J. Dated November 2, 2010

39 As previously noted, subsequent to the discoveries in June 2012, Zuber has produced 48 will-say statements and affidavits which provide more detail and particulars with respect to his alleged past and future losses of income, his reputation, Polish tax law, as well as a new alleged loss of opportunity with respect to a pipeline. The defence argues that these new will-says and affidavits are significantly different from those produced in accordance with the Order of Justice Lauwers.

40 The defence relies in part on a reference in the decision of Lauwers J. at paragraph 25 where he refers to a decision of Master Short in *Arunasalam v. Guglietti Estate*, *[2010] O.J. No. 3303*, where Master Short stated:

> It is my inclination to establish a rule that says if the party opposite is unwilling to go beyond the information they have with respect to the evidence of a non-party witness, then that part[y] ought to be limited at trial to presenting only evidence by that witness consistent with the summary given. If the party opposite obtains further information from the witness, [their] ongoing disclosure obligations will require them to advise the other side of any further evidence obtained.

41 In dealing with the aforesaid comment of Master Short, Lauwers J. went on to state:

> This would be an effective form of discipline, but it is beyond my authority as a motions judge, and it is more a matter for the trial judge.

42 Mr. Regan suggests that now that this matter is before me as the trial judge, I have the authority to impose the suggested discipline referenced by Lauwers J. above.

43 As to the form of the Order made by Lauwers J. in his Reasons of November 15, 2010, Lauwers J. at paragraph 26 provided guidance in terms of what was to be included in the will-say statement, and specifically at paragraph 26 stated:

> In the circumstances, this material must be provided well before the continuation of the examination for discovery. As to content, any such summary must contain ***a fair degree of detail*** addressing the normal journalistic questions related to the person and the relevant knowledge that he or she possess, being: "who, what, where, why and how". [Emphasis added]

44 What has now occurred, at least in part, if not largely because of a case management Order made by me in November 2014 requiring the evidence in-chief to be conducted by way of affidavit, is that plaintiff's counsel has obtained much more detailed information from the witnesses than he would otherwise have called in-chief. Those affidavits, in my view, as a matter of necessity, and also by reason of the passage of time and new information obtained, provide more detailed information than what was contemplated by paragraph 26 of the Order made by Lauwers J. The plaintiff is, and always has been, under an obligation to make continuing discovery. This would not be the first case where new and potentially unexpected evidence has materialized during the course of the trial. The defendants have now been in possession of the affidavits from the various witnesses who the plaintiff proposes to call. Those affidavits have been in the defence possession for some considerable period of time given the delays that have been inherent in the hearing of this case. This court has to balance any potential prejudice to the defendants against the fairness of ensuring that all relevant evidence is placed before the court from Zuber's perspective. The comments of McLaughlin J. in *R. v. O'Connor*, *[1995] 4 S.C.R. 411*, referenced in the Decision of Lauwers J. dated November 10, 2011, are equally applicable to the motion before me:

> The court aims for not necessarily the fairest of all possible trials, but rather a trial which is fundamentally fair...what the law demands is not perfect justice but fundamentally fair justice.

45 As I have advised counsel, in my view the plaintiff should not be precluded from calling the evidence of the various witnesses reflected in the affidavits that have been produced to date. The plaintiff remains under a continuing obligation to provide discovery of any evidence as it may materialize between now and the completion of the trial. If the plaintiff intends to call any further evidence, other than that which has already been disclosed, the plaintiff will have to establish why that evidence could not have been obtained by due diligence prior to today's date.

46 The defendants' motions are therefore dismissed. As to the question of costs, I will deal with the costs of the motions at the completion of the trial.

M.L. EDWARDS J.
