IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Abbasnejad v. Leifsson,*
2018 BCSC 850

Date: 20180221
Docket: S151680
Registry: New Westminster

Between:

Amir Abbasnejad

Plaintiff

And

David Odin Leifsson

Defendant

Before: The Honourable Madam Justice DeWitt-Van Oosten

Reasons for Judgment – Admissibility *Voir Dire*

Counsel for the Plaintiff:	Shadrin M. Brooks
Counsel for the Defendant:	Derek A. Frenette J. Abrioux (A/S)
Place and Date of Hearing:	New Westminster, B.C. February 20, 2018
Place and Date of Judgment:	New Westminster, B.C. February 21, 2018

[1] **THE COURT:** These reasons were initially delivered in the form of oral reasons. They have since been edited for publication.

[2] The plaintiff has filed a Notice of Civil Claim alleging assault and battery. The claim emerges out of a traffic dispute between the parties on June 29, 2012. After a verbal exchange outside their respective vehicles, the parties were involved in physical conflict.

[3] The plaintiff alleges that the defendant was the aggressor, viciously assaulted the plaintiff without provocation and left him with serious injuries to his left eye. Among other things, he claims that the assault has resulted in permanent double vision and, as a result, he is no longer able to work in his chosen field.

[4] The defendant acknowledges physical contact with the plaintiff, but says the contact did not unfold as alleged and, in any event, the defendant acted in self-defence. At the very least, he was provoked.

[5] The civil action is before a jury for trial. Two pre-trial issues have arisen. I heard submissions on them in a blended *voir dire*.

[6] First, the plaintiff seeks to tender evidence that the defendant was criminally charged with assault as a result of the incident.

[7] The charge was subsequently stayed (presumably pursuant to s. 579 of the *Criminal Code*, R.S.C. 1985, c. C-46), after the defendant agreed to the use of alternative measures.

[8] Section 717(3) of the *Code* statutorily prohibits any "admission, confession or statement accepting responsibility for a given act or omission" that forms part of the alternative measures process from being used against the "accused" in a civil proceeding. However, the plaintiff says this prohibition does not preclude reference to the fact of a criminal charge and/or the stay of proceedings.

[9] As part of the evidentiary narrative, the jurors will be told that police were called to the incident involving the parties and statements were provided by the

plaintiff and his wife. Counsel for the plaintiff argues that if the jury is not also told that a criminal charge was initiated as a result of the statements, but later stayed, it might draw an unfair inference against the trustworthiness and reliability of the plaintiff's case. The plaintiff is concerned the jurors might speculate that if there was no criminal charge, it must mean the plaintiff and his wife were not believed by police.

[10] On the second issue, the parties seek a ruling on the admissibility of "good character" evidence that the defendant seeks to tender in support of his defence. The proposed evidence speaks to the defendant's general reputation in the community, as well as specific incidents of demonstrated good character during his employment as a fireman.

[11] The defendant does not ask to put this evidence before the jury to bolster his credibility as a witness; rather, he argues it is relevant to the issue of whether it is likely he would have engaged in the form of conduct alleged by the plaintiff.

[12] In particular, the defendant says the specific incidents of good character will show that the defendant often faces stressful, high-conflict situations in his work, including people who are emotional and acting aggressively, and that he maintains a calm demeanour. The character witnesses are expected to testify that the defendant manages these situations well and does not display the form of behaviour described by the plaintiff to have occurred at roadside in June 2012.

[13] The plaintiff is opposed to the admission of this evidence. It is his position that good character evidence is presumptively inadmissible in civil proceedings. From the plaintiff's perspective, the defendant has not shown a principled basis for making an exception and he submits that if the defendant is allowed to call this evidence, it will result in an unfair bolstering of the defendant's position based on his employment as a fireman and stories about "heroic" or other actions brought to bear within that context.

[14] I have read the comprehensive written submissions filed by the parties on both issues, as well as the related authorities.

[15] On balance, and within the context of the circumstances before me, I have determined that neither form of evidence should be admitted before the jury.

A. Evidence of a Criminal Charge

[16] As noted, the plaintiff seeks to lead evidence that the defendant was criminally charged for his conduct on June 29, 2012 and a stay of proceedings was subsequently entered. It is proposed that the fact of a charge be led through the police officer who investigated the traffic dispute and alleged assault. The plaintiff intends to elicit the fact of a stay of proceedings from the defendant in cross-examination.

[17] The defendant says the admissibility of this form of evidence must be determined with reference to the provincial *Evidence Act*, R.S.B.C 1196, c. 124, which allows criminal "convictions" to be led from a witness (as long as they are not under appeal). A charge is not a conviction and, accordingly, it does not fall in scope.

[18] If he is wrong about that, the defendant argues that in the circumstances of this case, the prejudicial effect of the fact of the charge (and its potential for unduly influencing the jury), outweighs its probative value and the evidence should be held inadmissible on the basis of common law exclusionary principles.

[19] *Prima facie*, I do not agree with the defendant's suggestion that the provincial *Evidence Act* exhaustively determines the admissibility of evidence surrounding the alleged commission of a criminal act in civil proceedings, including the fact that a charge was laid.

[20] On their face, the provisions relied upon by the defendant in making this argument, ss. 15 and 71 of the *Act*, are permissive only, and, more importantly, they are specific to the use of "convictions" and "findings of guilt" in subsequent

proceedings. They do not address what may, or may not be done with other forms of evidence arising out of criminal investigations, when shown to be relevant to a material issue at trial.

[21] However, I need not decide this issue in any definitive way. It is my view that the evidence sought to be tendered by the plaintiff is of marginal relevance and should not be permitted, even as part of the narrative. In the absence of the jury hearing about the use of alternative measures, and how it led to a stay of proceedings, the fact of a charge and the fact of a stay will have no probative value.

[22] Including these facts as part of the evidentiary context, without an explanation of their nexus, which is barred from admission by virtue of s. 717(3) of the *Criminal Code*, will invite speculation on what happened to the criminal charge and the reason for the stay of proceedings. Given this reality, I am satisfied that the prejudicial effect of the evidence, to the defendant and the jury's deliberation process, outweighs its probative value. Accordingly, I decline to grant the plaintiff's application to tender.

[23] I am open to hearing from the plaintiff, at the pre-charge conference, on whether a cautionary instruction to the jury to not speculate about the absence of any mention of a criminal charge notwithstanding police involvement in the case, is something to be considered.

[24] Finally, the plaintiff is correct that there have been other cases in which a party's involvement in the criminal justice system arising out of the same set of facts has formed part of the narrative put before the trier of fact, notwithstanding the absence of a "conviction". To exemplify the point, he put two cases before me: *Reddemann v. McEachnie et al*, 2005 BCSC 915 and *Reimer v. Rooster's Country Cabaret Ltd.*, 2013 BCSC 2211. However, I note that both cases proceeded to trial by judge alone. In my view, the presence of a jury calls for different considerations.

B. Evidence of Good Character

[25] The defendant does not dispute that as a general rule, "character evidence is inadmissible [in civil cases] solely to prove or disprove that a party is or is not the sort of person who would commit or not commit the alleged act or omission or to bolster their credibility": *Austin v. Lynch*, 2016 BCSC 1344 at para. 45.

[26] However, he argues that in the circumstances of this case, where the nature of the tortious conduct alleged by the plaintiff is criminal in nature, the general rule should be relaxed and greater flexibility is required, similar to the approach taken in criminal proceedings.

[27] In making this argument, the defendant relies heavily on the decision of the Ontario Court of Appeal in *Plester v. Wawanesa Mutual Insurance Co.*, [2006] O.J. No. 2139 (Ont. C.A.). In that case, the defendant insurance company denied coverage for a building fire based on the assertion that the insured plaintiffs committed arson. In an action against the insurance company, the trial judge allowed the plaintiffs to "call evidence of their general reputation in the community": at para. 42.

[28] The Court of Appeal upheld this determination:

> [43] … the trial judge did not err in admitting character evidence in this case. Once the appellant alleged arson against the Plesters, it was permissible for them to respond with the kind of evidence that would be available to them in a criminal court.

[29] The defendant says I should take the same approach to admissibility in the case before me. The plaintiff alleges an assault, which is criminal in nature. In criminal prosecutions for assault, character evidence has been recognized as admissible for two purposes: (1) to support the credibility of the accused; and (2) to support an inference that the accused was unlikely to have committed the alleged offence: *R. v. Flis*, [2006] O.J. No. 442 (Ont. C.A.) at para. 39. The defendant seeks to import this same admissibility framework into the civil context. From his perspective, there is no good policy reason to distinguish between the two.

[30] The decision in *Plester v. Wawanesa Mutual Insurance Co.* is not binding on me.

[31] The defendant says it was impliedly endorsed by this Court in *Hathaway v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 938, a petition for judicial review involving an administrative driving prohibition imposed under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. There, the adjudicator was found to have committed an error by refusing to consider evidence of good character as filed by the petitioner. With explicit reference to *Plester v. Wawanesa Mutural Insurance Co.*, Justice Johnston noted:

> [18] … if one can put character in issue in civil proceedings in order to defend against an allegation that would amount to a crime if made in criminal proceedings, I can see no good reason to prevent the petitioner here from putting her character in issue on her application for a review under s. 215.48 of the *Act*.

[32] I find *Hathaway v. British Columbia* to be of little assistance.

[33] Justice Johnston's implied endorsement of *Plester v. Wawanesa Mutual Insurance Co.* occurred within the context of a statutory administrative regime in which the decision-makers are "not bound by the normal rules of evidence": *Nagra v. British Columbia (Superintendent of Motor Vehicles)*, 2010 BCCA 154, as cited in *Pan. v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1766 at para. 6. Indeed, they are statutorily obliged to consider "any relevant written statements or evidence submitted by the applicant" who seeks review of the imposed prohibition: s. 215.49, *Motor Vehicle Act*. [Emphasis added.] Justice Johnston did not address the admissibility of good character evidence in civil proceedings, generally, and *Hathaway* cannot be taken as reflecting a full analysis of the issue.

[34] I accept that in a civil claim involving allegations of *quasi*-criminal conduct that is fraudulent or deceitful in nature, or which is predicated on the alleged spread of untruths (such as a claim in defamation), there may be a principled basis for the introduction of good character evidence as part of a case-in-chief. Subject to the

discretion of the trial judge, this evidence might be shown to be relevant for one or both of the purposes enunciated in *R. v. Flis*.

[35] However, this is not the context before me and a determination on that issue must await another day. I decline to make any general pronouncement on the matter. Instead, I am satisfied that within the circumstances of this case, the general rule (or presumption) against admissibility of good character evidence in civil proceedings should prevail.

[36] Consistent with the concerns expressed, and conclusions reached, in *Robertson v. Edmonton (City) Police Service (#11)*, 2005 ABQB 499 and *Gentles v. Toronto (City) Non-Profit Housing Corp.*, [2006] O.J. No. 1013 (Ont. Supt.Ct.), I am satisfied that:

a) the good character evidence proposed by the defendant is of minimal (if any) probative value. The fact that the defendant may have shown a calm demeanour and declined from engaging in physical aggression in other stressful or high-conflict scenarios, specific to his employment context, sheds no real light on whether he would, or would not, act as an aggressor in a materially different, non-employment context. As noted in *Robertson*, "The fact that a litigant may have done good deeds on a prior occasion is little evidence that they did not do a bad deed on this particular occasion": at para. 12;

b) allowing this evidence to go before the jury invites consideration of collateral facts that are of marginal relevance and carries the realistic potential, despite the best intentions of counsel, that it will unduly consume trial time, confuse the issues before the jury and "prejudice the proper outcome of the trial": Delisle and Stuart, *Evidence: Principles and Problems,* 6th ed., (Toronto: Carswell, 2001) at p. 125, as cited in *Robertson* at para. 12. This is particularly so if, in response to the evidence, the plaintiff considers it necessary to counterbalance its prejudicial effect by raising issues of good character on his own behalf; and,

c) although the plaintiff was given pre-trial notice that the defendant might seek to call character evidence, it was absent particularity. I accept that he has been caught by surprise on the substance of the evidence, especially the fact that it is intended to extend beyond evidence of general reputation. The will-says provided in relation to the proposed witnesses do not set out the circumstances of the alleged previous incidents of good character.

[37] In light of the jurisprudence in this province, as it currently stands, and the need to ensure that this action remains "within manageable limits", I rule against the defendant on this second issue. He is prohibited from calling good character evidence as part of his defence.

"DeWitt-Van Oosten J."