31 C.P.C. (4th) 297, 113 O.A.C. 346, 167 D.L.R. (4th) 132

O'Brien v. Shantz

Eileen M. O'Brien and Edward O'Brien, Plaintiff (Respondent) and Aden M. Shantz, Defendant (Appellant)

Ontario Court of Appeal

Laskin, Charron, O'Connor JJ.A.

Heard: August 26, 1998
Judgment: October 15, 1998
Docket: CA C23451

Counsel: Bruce A. Thomas, for the appellant.

Earl A. Cherniak, Q.C. and Kirk F. Stevens, for the respondent.

Cases considered:

Adderley v. Bremner, [1968] 1 O.R. 621, 67 D.L.R. (2d) 274 (Ont. H.C.) -- referred to

Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.) -- considered

Hamstra (Guardian ad litem of) v. British Columbia Rugby Union, 145 D.L.R. (4th) 193, (sub nom. Hamstra v. British Columbia Rugby Union) 211 N.R. 89, (sub nom. Hamstra v. British Columbia Rugby Union) 89 B.C.A.C. 161, (sub nom. Hamstra v. British Columbia Rugby Union) 145 W.A.C. 161, (sub nom. British Columbia Rugby Union v. Hamstra) [1997] I.L.R. I-3439, [1997] 1 S.C.R. 1092, 35 C.C.L.T. (2d) 1, 34 B.C.L.R. (3d) 10, [1997] 7 W.W.R. 92, 9 C.P.C. (4th) 1 (S.C.C.) -- considered

Statutes considered:

Evidence Act, R.S.O. 1990, c. E.23

s. 20 -- referred to

s. 21 -- referred to

s. 35(2) -- considered

APPEAL by defendant against judgment for plaintiff in motion vehicle accident action.

Per curiam:

1 The defendant Aden M. Shantz appeals the judgment of Molloy J. seeking either a new trial before a judge and jury or a reduction in the damages award. We called on the respondent, the plaintiff Edward O'Brien, on only two issues: first, whether the trial judge erred in discharging the jury; and second whether the trial judge erred by failing to take into account negative contingencies in her award of past and future loss of income.

1. The Discharge of the Jury

2 This is the main ground of appeal. After nine days of trial and after both counsel had made their closing addresses, the trial judge on the plaintiffs motion, discharged the jury and gave judgment herself. The appellant submits that the trial judge erred on two grounds in discharging the jury. The appellant argues that the trial judge erred first, by failing to conclude that the Workers' Compensation Board ("WCB") records filed in evidence were admissible for the truth of their contents as

business records under s. 35(2) of the *Evidence Act*, R.S.O. 1990 c. E.23; and second, by concluding that defence counsel (not Mr. Thomas) had breached the requirements of fairness when he referred to the WCB records in his closing address to the jury in an attempt to show inconsistencies between the plaintiff's testimony at trial and statements attributed to the plaintiff in the records. Alternatively, the appellant argues that the fairness concerns prompting the plaintiff's motion could have been remedied by further instructions to the jury.

3 We do not accept these arguments. The trial judge was faced with an unusual and difficult situation. She gave thorough and considered reasons for exercising her discretion to discharge the jury. Not only do we find no reviewable error in the exercise of that discretion, we agree with her decision.

4 Plaintiff counsel's motion to discharge the jury stemmed from defence counsel's use of the WCB records during his closing argument to impeach the plaintiff's credibility. Before trial both counsel had given notice under the business records provision of the *Evidence Act*, s.35(2), that they intended to put the plaintiff's WCB records before the court. On the first day of trial, plaintiff's counsel filed, on consent, one volume of approximately 400 pages of WCB records. This was not the plaintiff's entire WCB file. Defence counsel took the position that the entire file should be before the court, and on the fourth day of trial, additional WCB reports were filed, again on consent. The total WCB file was approximately 500 pages.

5 At no time did either counsel say that the records were being filed for the truth of their contents. No evidence was called about the nature of the records or the circumstances in which they were made. Although s.35(2) of the *Evidence Act* does provide for an exception to the hearsay rule, the entire contents of the records do not constitute evidence of the truth of their contents by the mere fact that they are introduced following the service of a notice under s.35. Any record sought to be relied upon for the truth of its contents must fall within the scope of the statutory exception. See: *Adderley v. Bremner*, [1968] 1 O.R. 621 (Ont. H.C.). Given the large volume of material and the diverse nature of these records, defence counsel could not reasonably have thought that plaintiff's counsel was accepting every statement in the records for its truth. Moreover, the trial judge did not understand that either counsel was conceding the truth of any of the WCB documents.

6 Defence counsel never once referred to the WCB records during his lengthy cross-examination of the plaintiff. When the second volume of WCB records was filed, defence counsel did not ask to have the plaintiff recalled for further cross-examination. Instead, defence counsel made a tactical decision not to examine the plaintiff on the WCB records because he did not want to give plaintiff's counsel an opportunity to address any inconsistencies in re-examination. In closing argument, however, defence counsel used the records to attack the plaintiff's credibility. He gave the jury copies of the records and referred to several pages to show that the plaintiff had advanced two contradictory versions of his medical condition, one to obtain WCB benefits, the other to obtain a large damages award.

7 In granting the plaintiff's motion to discharge the jury, the trial judge recognized the general principle that a party wishing to impeach the credibility of a witness must ordinarily put the contradictory material to the witness in order to give the witness an opportunity to explain it. This principle, at bottom a principle of fairness, is reflected in the House of Lords decision *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) and in ss. 20 and 21 of our *Evidence Act*. The trial judge recognized that the principle was not absolute but she concluded:

> In my opinion, both Section 21 of the Ontario *Evidence Act* and the rule in *Browne v. Dunn* are applicable to the situation before me, and both have been violated in spirit, as well as in substance.

8 She found, as contended by plaintiff's counsel, that if defence counsel wanted to use the records to challenge the plaintiff's credibility, he was obliged to have given the plaintiff an opportunity to explain the alleged inconsistencies.

She observed:

> On the facts of this case, I agree with Mr. O'Hagan's position. I might have ruled differently if the alleged inconsistencies were clearly and blatantly before the Court in earlier evidence, in such a manner as to cry out for some explanation by the plaintiff when he subsequently testified. However, the inconsistencies were buried within five hundred pages of material which had been filed in a routine manner on consent.
>
> In those circumstances, I think it completely unfair to Mr. O'Brien to extract bits and pieces of those documents, including notes regarding snippets of telephone conversations two-and-a-half years ago, and to use those excerpts to attack his credibility now, without giving him any opportunity to confirm, deny or explain. This smacks to me of trial by ambush, and I don't believe it should be permitted. It simply doesn't appear to me to be fair or to be in keeping with the principles underlying Section 21 of the *Evidence Act* or the Rule in *Browne v. Dunn*.

9 The trial judge held that after both parties had closed their case it was too late to redress the unfairness to the plaintiff by recalling him to testify in reply. Moreover, defence counsel did not ask that the plaintiff be recalled. She also held that the unfairness could not be remedied by instructions to the jury. On this point, she concluded:

> I am inclined to agree with counsel for the plaintiff. It would be extremely difficult for a lay jury to sort out what evidence is permitted be taken into account in assessing credibility and what should not. I am particularly troubled by the March 23rd, 1993 memo, which purportedly evidences a directly contradictory statement made by the plaintiff on an issue central to the case.

10 Therefore, although recognizing the importance of the right to a jury trial, the trial judge concluded that she should discharge the jury:

> I recognize that the right to trial by jury is an important one, and ought not to be interfered with lightly. I gave this matter a good deal of thought, indeed anguished thought. On balance, I feel that any unfairness to the defendant in discharging the jury in these circumstances is outweighed by the unfairness to the plaintiff in leaving the jury in. The statements referred to by Mr. Zarek are so potentially prejudicial that I do not believe justice would be served for Mr. O'Brien if the jury remained.

11 We agree with the trial judge's decision and with her reasons. We make these four additional comments. First, we reject the appellant's main contention that the entire WCB records could be used for the truth of their contents because the records were filed under s.35(2) of the *Evidence Act*. Although each party served notice of his intention to file these records under s.35(2), certain prerequisites must be shown to exist before a record can properly be admitted as proof of its contents under that provision. The section reads as follows:

> s.35(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event *if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record* at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. [Emphasis added.]

As we said earlier, no evidence was led about the nature of the records or the circumstances in which they were created. In our view, the appellant has not shown that the WCB records he intended to use to contradict the plaintiff's testimony properly fell within the scope of s.35(2). Therefore, the trial judge was correct in concluding that the records were simply filed without formal proof of their authenticity and were not admissible for the truth of their contents.

12 Second, the appellant's submission on s.35(2) of the *Evidence Act* ignores the fundamental unfairness that took place. What was fundamentally unfair was that defence counsel deliberately refrained from asking the plaintiff about the inconsistencies while he was in the witness box and instead waited to attack his credibility when he had no opportunity to respond. The appellant submits that because the WCB records were not independent or extrinsic evidence, having been filed by the plaintiff, the rule in *Browne v. Dunn* had no application. In the context of this case, the distinction drawn by the appellant is irrelevant. It is unrealistic and unfair to have expected the plaintiff to have reviewed voluminous material to search for inconsistencies not brought to his attention while being examined. Fairness required that the plaintiff be given an opportunity to explain the inconsistencies before his credibility could be impeached by them.

13 Third, the appellant submits that defence counsel had little choice but to refer to the WCB records during his closing address because he had to close first and plaintiff's counsel had already signalled that he was going to review the records with the jury by pointing out to them those records that assisted his case. It is true that early in the trial plaintiff's counsel told the court that he would be reviewing some of the WCB records with the jury and yet during the course of the evidence he never did so. Still, in our view, plaintiff's counsel's conduct does not assist the appellant. It would have been no more open to plaintiff's counsel to refer to the WCB records during his closing address than it was to defence counsel. In the light of the way counsel conducted the trial, plaintiff's counsel could not have used the records to support his client's credibility and defence counsel could not use them to impugn the plaintiff's credibility.

14 Fourth, the trial judge's order discharging the jury was a discretionary order. On appeal it is accorded the same deference as other discretionary orders. See: *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union* (1997), 145 D.L.R. (4th) 193 (S.C.C.). Unless the order is unreasonable or reflects an error in principle or in law, this court is not justified in interfering with it. The trial judge did not err in discharging the jury and, as we have already said, we agree with her order. Moreover, as Major J. wrote in *Hamstra (Guardian ad litem of)*at p. 203 "it cannot be overstated that the trial judge is in the best position to determine how to exercise this discretion". As the trial judge properly exercised her discretion, the appellant's main ground of appeal fails.

2. Contingencies

15 The trial judge awarded $90,000 for past loss of income and $678,200 for future loss of income. She expressly took into account negative contingencies in her award of past income loss. The claim for past loss of income covers the five-year period from 1991 to 1995. Because of contingencies, the trial judge awarded loss of income for only three years and at the reduced annual figure of $30,000. She said:

> I find as a fact that but for the motor vehicle accident he would have graduated in 1991. Further, I believe he would have obtained employment within a reasonable time thereafter. I therefore am of the opinion that there is some lost income between 1991 and 1995 for which the defendant is responsible. However, due to the recession and job cutbacks, it is quite possible that Mr. O'Brien would not have been employed for that whole period. Allowing for this contingency, as well as time to find a job and an entry level wage, I assess his lost income claim at $30,000.00 per year for three years, for a total of $90,000.00.

The negative contingencies lowered the past income loss award from $200,000 to $90,000.

16 In awarding future loss of income, the trial judge found that the plaintiff would be working today, and indeed would be working until the usual retirement age, were it not for the accident. She also found that neither the plaintiff's Addison's disease nor his head injury interfered with his ability to obtain full-time

employment. These findings limited the extent to which negative contingencies could affect the award for future loss of income.

17 Still the trial judge expressly factored two contingencies into her award. She deducted $2,000 per year for the possibility that the plaintiff would earn some income from working part-time; and she refused to give the plaintiff any credit for salary increases beyond the rate of inflation. Instead she concluded: "Given the fact that his pre-injury earnings were below the average, I have not allowed any increase for that contingency".

18 We are therefore satisfied that the trial judge adequately took account of negative contingencies in her assessment of the plaintiff's loss of past and future income. The appellant's real argument is not that the trial judge failed to consider negative contingencies but that she should have made a greater deduction for them. That argument is met by the deference an appellate court must accord to a trial judge's assessment of damages. Therefore, this ground of appeal also fails.

19 Accordingly, the appeal is dismissed with costs.

Appeal dismissed.