COURT OF APPEAL FOR YUKON

Citation: *Liedtke-Thompson v. Gignac*,
2014 YKCA 2

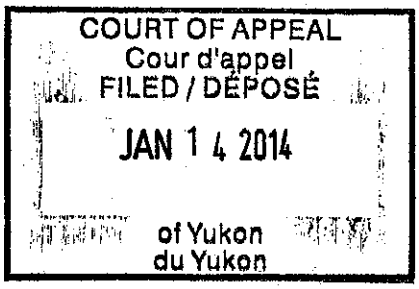
Date: 20140114
Docket: 12-YU715

Between:

Tina Liedtke-Thompson

Appellant
(Plaintiff)

And



Paul Gignac

Respondent
(Defendant)

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On Appeal from an Order of the Supreme Court of Yukon, dated February 4, 2013
(*Liedtke-Thompson v. Gignac*, 2013 YKSC 9, Whitehorse Registry,
Docket Number 11-A0009).

Counsel for the Appellant:	S. Roothman
Counsel for the Respondent:	D.L. Fendrick
Place and Date of Hearing:	Whitehorse, Yukon November 12, 2013
Place and Date of Judgment:	Vancouver, British Columbia January 14, 2014

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

Summary:

Appeal from an order dismissing the appellant's claim and allowing the respondent's counterclaim for assault and battery, arising from an incident at a house party. The trial judge found the appellant's evidence neither credible nor reliable and concluded she had failed to prove her claim. He found the respondent's evidence and that of an eye-witness to the incident to be broadly consistent and mutually corroborative of the evidence of other witnesses, and capable of explaining how the appellant suffered her injuries. On appeal, the appellant claims the trial judge erred in deciding evidentiary issues, and made palpable and overriding errors in his findings of fact, inferences drawn from those facts, and his assessment of credibility.

Held: *appeal dismissed. The appellant's arguments were a reargument of the case. The trial judge made no errors that would cause this Court to interfere.*

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] After an incident at a house party, the appellant and the respondent sued each other for assault and battery. The trial judge dismissed the appellant's claim and allowed the respondent's counterclaim. The appellant appeals.

[2] The case turned on the trial judge's assessment of the credibility and reliability of the evidence of the parties and other witnesses. The appellant claims the trial judge made palpable and overriding errors in his findings of fact, the inferences he drew from those findings, and his assessment of credibility. She also argues that he erred in deciding evidentiary issues, including misapplying the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).

[3] In assessing the evidence, the trial judge considered and gave numerous reasons for finding that the appellant's version of the incident was not credible or reliable, and for accepting the version given by the respondent. As the trial judge did not make palpable or overriding errors of fact or any errors of law or principle, I find no basis for this Court to interfere. It follows that I would dismiss the appeal.

Background

[4] The appellant lived next door to the respondent and his family. The two families were good friends, especially the appellant and the respondent's wife. During the month before the incident in question, the respondent visited the appellant at her home on two occasions. The appellant claimed that during the second of those visits, the respondent made inappropriate sexual advances. The appellant says she decided to talk to the respondent's wife about the respondent's conduct, which she did during the party at the respondent's house.

[5] The respondent's wife was very upset, asked the appellant to leave and locked herself in the bathroom. The appellant, seeing pills on the counter of the

bathroom, called the police, who came and took the respondent's wife to the hospital.

[6] The appellant went to the respondent's shop at the rear of the property to tell him what had happened to his wife. A verbal altercation occurred, followed by the incident of assault that is the subject of these proceedings.

[7] The appellant claimed the respondent confronted her and punched her in the eye. She said she fell to the floor, and the respondent kicked and stomped on her while she was on the ground. She managed to get out of the shop, and said one of the party guests helped her to leave the respondent's property.

[8] The respondent testified that the appellant came into the shop and advanced on him, trying to scratch at him and strike him in the face. He swore at her and attempted to block her hands and arms, backing up between a parked car and a snow machine. As the parties approached the door of the shop, the respondent turned away from the appellant, telling her to leave.

[9] A witness, Mike Symynuk, testified that he saw the appellant pick up a piece of wood and hit the respondent on the head from behind. He testified further that he observed the appellant and the respondent fall together over the snow machine, with the respondent landing on top of the appellant. Mr. Symynuk heard moaning and crying and observed the respondent get off the appellant, who immediately left the shop.

[10] The police attended and arrested the respondent for assault. He spent the night in jail. He was later charged with assault causing bodily harm, but the charges were stayed.

[11] The appellant claimed she suffered injuries, including swelling and a contusion around her left eye, a contusion on top of her head, bruises on her arms and legs, and a fractured collarbone. She also claimed psychological injuries.

[12] The respondent had two lacerations to his head, for which he received stitches at hospital the next day.

The Trial Judge's Reasons for Judgment

[13] The trial judge found the appellant to be lacking in credibility and reliability, based primarily on his assessment of inconsistencies in her evidence. He concluded that she had failed to prove her claim, and furthermore that she had not provided any rational explanation for how the respondent suffered his injuries.

[14] He found the evidence of the respondent and Mr. Symynuk to be broadly consistent and mutually corroborative of the evidence of other witnesses. He also concluded that Mr. Symynuk's evidence was capable of explaining how the appellant suffered her injuries; that is, from falling with the respondent over the snow machine.

[15] In the result, the trial judge dismissed the appellant's claim and allowed the respondent's counterclaim.

The Appeal

[16] I will deal with each of the appellant's grounds of appeal in turn.

Evidentiary Issues

Assessment of the Expert Evidence

[17] The appellant's evidence included the opinions of two doctors. Dr. Chau was the emergency room physician who examined the appellant after the incident. Dr. Macdonald was the appellant's family physician. Both doctors opined that the appellant's injuries were consistent with an assault, based in part on the appellant's report of the incident. On cross-examination, when asked whether the appellant's injuries could have been caused by a fall, both doctors stated that it was possible.

[18] The trial judge dealt with the medical evidence (at para. 103):

> The plaintiff's counsel further submitted that Ms. Liedtke's version of events is corroborated by the two medical doctors. However, each of the doctors also indicated that they were relying heavily upon the history of assault told to them by Ms. Liedtke in reaching their opinions on how the injuries were sustained. Further, they each allowed that Ms. Liedtke's injuries may not only have been the result of an assault, but could be attributed to other trauma, such as falling over an object and onto the floor. It is also clear that the truth of what the plaintiff reported to her doctors must be established by the plaintiff's own evidence: *W.R.B. v. Plint,* 2001 BCSC 997, at para. 350. [*Blackwater v. Plint*] [Emphasis added.]

[19] The trial judge did not find credible the appellant's evidence that her injuries were the result of an assault, and rejected the doctors' opinions on that basis.

[20] The appellant claims the trial judge erred in applying *Blackwater v. Plint* by overlooking the objective evidence of the appellant's injuries confirmed by the doctors' observations.

[21] It was open to the trial judge to reject the appellant's evidence and accept the doctors' concessions that her injuries could have been caused by a fall.

[22] I would not accede to this ground of appeal.

Police Officer's Evidence on Medical Issues

[23] At trial, the police officer who attended at the respondent's home after the incident testified in cross-examination that the respondent's demeanour at the time was suggestive of someone she had seen with a head injury. The trial judge referred to this testimony (at para. 61): "On cross-examination, [Constable MacQuarrie] agreed that Mr. Gignac was extremely cooperative, but was 'totally out of it', which could have been due to a head injury." The trial judge also referred to the respondent being "treated for concussion" (at para. 92).

[24] The appellant says the police officer's opinion about whether the respondent suffered from a head injury should not have been admitted, and there was no evidence that the respondent was treated for a concussion.

[25] The respondent says that the police officer's opinion, based on her observations, was admissible, relying on *Graat v. The Queen*, [1982] 2 S.C.R. 819 at 835, where the Court held that a non-expert witness is allowed to give opinion evidence on "the bodily plight or condition of a person, including death and illness".

[26] The trial judge did not err in admitting the police officer's evidence. Whether the respondent suffered a head injury or a concussion was not material to the trial judge's finding that his injuries were caused by the appellant's assault. The nature and severity of those injuries was not in issue in this trial, which considered liability only.

[27] I would not accede to this ground of appeal.

Admissibility of Hospital Record; X-ray of Appellant's Collarbone

[28] The appellant claims the trial judge erred with respect to the admissibility of two medical records.

[29] The respondent's emergency room record was admitted as a business record under the *Evidence Act*, R.S.Y. 2002, c. 78, s. 39. The hospital record was attached to the affidavit of the hospital's Manager of Admissions and Health Records, who deposed she was the custodian of the record and identified it as having been made in the ordinary course of business of the hospital. The appellant objected to the record being admitted on the ground that the doctor or nurse who observed the facts set out in it did not testify as to its identity and making. The trial judge ruled that the document was admissible on the basis that the respondent was not relying on it for the truth of its contents.

[30] Despite his ruling, the trial judge referred to this record (at paras. 50 and 97) for the fact that the respondent had two lacerations to his head.

[31] The appellant sought to have admitted into evidence an x-ray image of her collarbone. Respondent's counsel objected. She advised the trial judge the respondent did not dispute that the appellant fractured her collarbone, but disputed

the cause. The trial judge refused to admit the x-ray "without an expert's assistance or a medical doctor's interpretation of what those images mean".

[32] The admissibility of these items of evidence would not have had an impact on the outcome of the trial. The particulars of the injuries suffered by each of the parties were not controversial; the dispute at trial was whether they were caused by the alleged assaults.

[33] I would not accede to these grounds of appeal.

Palpable and Overriding Errors of Fact and Inferences of Fact

[34] The appellant claims the trial judge made palpable and overriding errors by confusing the wood with which the respondent was allegedly struck with a piece of pallet that was entered as an exhibit; finding the parties fell over the snow machine though Mr. Symynuk testified that he was not sure whether they fell over skis or the snow machine; and not finding that the respondent and his friends at the party were intoxicated to the extent that it affected their reliability and credibility. She claims further that he erred in drawing inferences of fact when he found that the parties fell over the snow machine and subsequently struggled before getting up, and that the fall over the snow machine was capable of explaining the appellant's injuries.

[35] All of these claims amount to reargument about the weight the trial judge gave to particular parts of the evidence.

[36] It is clear from reviewing the trial judge's reasons for judgment and the transcript that he was alive to the difficulties in the evidence resulting from the level of intoxication of the parties and the witnesses at the time of the incident. In assessing the credibility and reliability of the parties and other witnesses, he considered the inconsistencies in the evidence of the appellant, between her evidence and that of the respondent and the witnesses who testified on his behalf, and between the witnesses other than the parties.

[37] After considering all of the evidence, the trial judge concluded the appellant's evidence lacked reliability and credibility. On the other hand, he found the respondent's evidence was credible and supported by the other witnesses, especially Mr. Symynuk, who was an eyewitness to the assault. The trial judge considered the frailties in all of the evidence, including Mr. Symynuk's, due to the level of intoxication of the parties and the witnesses at the time of the incident. He also considered the inconsistencies in the details of the assault as reported by Mr. Symynuk's and the other witnesses. He found that Mr. Symynuk's position as an eyewitness, whose evidence was broadly consistent with that of the respondent and the other witnesses, led to proof of the respondent's claim.

[38] It is not necessary to restate the high deferential standard of appellate review applicable to a trial judge's findings of fact and inferences drawn from those facts, and a trial judge's conclusions concerning the reliability and credibility of a witness's evidence. It cannot be said that the trial judge plainly misinterpreted, ignored, or misunderstood material evidence that led him to the wrong result. For a summary of the standard of review, see *Fuller v. Harper*, 2010 BCCA 421 at paras. 34-37.

[39] I would not accede to these grounds of appeal.

Application of the Rule in *Browne v. Dunn*

[40] The appellant argued at trial that respondent's counsel's failure to cross-examine her on the theory that her injuries were caused by falling over the snow machine did not allow her an opportunity to confront the crux of the respondent's case, citing the rule in *Browne v. Dunn*. On appeal, the appellant claims the trial judge's failure to apply the rule in *Browne v. Dunn* affected the fairness of the trial.

[41] The trial judge dealt with the appellant's argument (at para. 109):

> The plaintiff's counsel also argued that Mr. Gignac's version of the events was not put to Ms. Liedtke in cross-examination. This raises the issue of the so-called rule in *Browne v. Dunn*. The purpose of the rule, which is more commonly employed in criminal cases, is to ensure that a witness is given an opportunity to state his or her position about the contradictory evidence of a later witness, by requiring counsel cross-examining the first witness to bring

> that person's attention to the nature of the contradictory evidence. The rule was well summarized in *R. v. Verney*, (1993), 87 C.C.C. (3d) 363 (Ont. C.A.), at para. 28:
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> > "... *Browne v. Dunn* is a rule of fairness that prevents the "ambush" of a witness by not giving him an opportunity to state his position with respect to later evidence which contradicts him on an essential matter. It is not, however, an absolute rule and counsel must not feel obliged to slog through a witness's evidence-in-chief putting him on notice of every detail that the defence does not accept ..." (my emphasis) [Gower J.]
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> Further, as was noted in *Stewart v. Canadian Broadcasting Corporation* (1997), 150 D.L.R. (4th) 24 (Ont. C.J. (Gen. Div.)), at para. 377, civil actions generally result in much greater disclosure of the factual issues than takes place in a criminal prosecution. In the case at bar, Mr. Gignac's theory of the case is clearly set-out in his counterclaim. Furthermore, both parties have been examined for discovery. Therefore, I fail to see how Ms. Liedtke is in any way prejudiced from the fact that Mr. Gignac's counsel did not specifically cross-examine her on each of the allegations made by him and his witnesses regarding her assault upon him. Therefore, I give no merit to this submission.

[42] This Court recently reviewed the application of the rule of *Browne v. Dunn* in *R. v. Drydgen*, 2013 BCCA 253. In *Drydgen*, Mr. Justice Donald for the Court confirmed that the rationale for the rule is fairness, and requires counsel who wish to impeach the credibility of a witness they cross-examine to give notice to the witness of their intention (at para. 13, quoting at length from *The Law of Evidence in Canada*, 3d ed. (Markham, Ontario: LexisNexis, 2009, at §16.179-§16.180; see also §16.181-§16.182). As to the application of the rule, he said (at para. 17):

> While a problem of fairness could theoretically arise from a failure to cross-examine on a point later advanced in argument, the concern will almost always be considerably attenuated. This is especially so when the argument flows naturally from the direction taken in cross-examination, rendering any suggestion of ambush illusory: see *R. v. Ali*, 2009 BCCA 464 at para. 39. The confrontation must be a meaningful exercise rather than merely the performance of a ritual where the witness is invited to agree with a proposition later to be argued to the effect that his testimony is unreliable. I refer in this regard to the remarks of Chief Justice McEachern in *R. v. Khuc*, 2000 BCCA 20, 142 C.C.C. (3d) 276:
>
> > [44] Crown counsel's point is well taken. There can be no doubt that the general rule is that counsel must confront a witness with any new material he or she intends to adduce or rely on after the witness has left the box. However, the rule does not go so far as to require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she

> is very unlikely to change. Judges tell juries that they may accept or disbelieve all or any part of the evidence of a witness. That instruction does not depend upon opposing counsel asking unnecessary questions. With respect, I believe the law is correctly stated in the case of *R. v. Mete*, [1973] 3 W.W.R. 709 (B.C.C.A.), particularly at 713. I do not believe the rule is any different if the evidence on which there is no cross-examination directly contradicts the evidence of the Crown or merely supports a fact inconsistent with the Crown's theory of the case. Counsel who does not cross-examine takes the chance that the evidence will be accepted; but rather than embark upon a futile cross-examination, counsel is entitled, as Crown counsel did in this case, to rely on the judgment of the jury as to what evidence it will accept. [Emphasis added.] [by Donald J.A.]

[43] In this case, as the trial judge noted, the respondent's theory as to the cause of the appellant's injuries was set out in his counterclaim and was put to her in examination for discovery. The appellant had ample and effective notice of the respondent's case. The fact that respondent's counsel did not cross-examine her on the respondent's theory of the case did not affect the fairness of the trial.

[44] I would not accede to this ground of appeal.

Summary and Conclusion

[45] This was a case of conflicting and inconsistent evidence offered by the parties and witnesses. The trial judge heard the evidence, weighed and assessed it in drawing conclusions concerning the credibility and reliability of the witnesses and in making findings of fact and drawing inferences and conclusions about liability for the alleged assaults. That is the job of the trial judge. The appellant has not shown that he made any errors that would cause this Court to interfere.

[46] I would dismiss the appeal.

[47] Neither party made submissions as to costs. Subject to any submissions that either party wishes to make, I would order that the respondent is entitled to the costs of the appeal. If a party wishes to make submissions, they should be forwarded in writing to the other party, with a copy to the registry. Any response should be delivered to the other party and to the registry. The registry will forward the

submissions to the division when they are received. All submissions on costs shall be delivered to the registry no later than two weeks after the date of the release of these reasons for judgment.

R.E. Levine J.A.

The Honourable Madam Justice Levine

I Agree:

L. Neilson J.A.

The Honourable Madam Justice Neilson

I Agree:

D. Garson J.A.

The Honourable Madam Justice Garson