COURT OF APPEAL FOR ONTARIO

CITATION: Gilbert v. South, 2015 ONCA 712
DATE: 20151027
DOCKET: C58773

Laskin, Lauwers and Hourigan JJ.A.

BETWEEN

Steven Gilbert

Plaintiff (Respondent)

and

Michael Scott South, Cullen Pratt, Edward Broomfield and York Fire & Casualty Insurance Company

Defendants (Appellant)

Todd J. McCarthy, for the appellant

Richard J.T. Shaheen, for the respondent

Heard: April 9, 2015

On appeal from the judgment of Justice Ian F. Leach of the Superior Court of Justice dated July 7, 2014 and the order dismissing the defendant's motion for a ruling on collateral benefits dated July 7, 2014, with reasons reported at 2014 ONSC 3485, 120 O.R. (3d) 703.

Laskin J.A.:

Overview

[1] York Fire & Casualty Insurance Company appeals the judgment of Leach J., following a jury verdict awarding the respondent Steven Gilbert damages for injuries he sustained in a car accident.

[2] Gilbert worked as a letter carrier for Canada Post. The car accident in which he was injured occurred in April 2010. At the time, he was 37 years old. The other driver, the defendant Michael Scott South, was entirely at fault for the accident, but he was uninsured. Gilbert, however, had uninsured and family protection coverage with his own insurer, York Fire. Thus York Fire was liable to pay any damages awarded to Gilbert.

[3] The trial took place in March 2014. York Fire admitted liability, and so only the question of Gilbert's damages was tried. The main issue at trial was causation. Gilbert claimed that the accident was wholly responsible for his injuries. York Fire maintained that Gilbert sustained only moderate injuries in the accident, and that the injuries he complained of were largely attributable to a low back condition, which pre-dated the accident, and were exacerbated by workplace injuries he sustained after the accident. York Fire argued in particular that a post-accident injury in November 2011 – "the grey box incident" – caused Gilbert to ask Canada Post for a transfer from a letter carrier to a more sedentary inside job.

[4] The jury's award reflected its acceptance of Gilbert's position. It awarded him total damages of nearly $500,000 broken down as follows:

- $70,000 in general damages (reduced to $40,000 because of the automatic statutory deductible)
- $5,800 for pre-trial loss of income
- $250,000 for future loss of income and earning capacity
- $57,250 for future care costs
- $85,000 for home maintenance and handyman expenses

[5] The principal issue on appeal arises out of counsel for Gilbert's closing address to the jury. York Fire contended the address was improper and brought a motion for a mistrial. The trial judge dismissed the motion but gave a correcting instruction to the jury. York Fire submits that he erred in failing to grant a mistrial; or alternatively he erred because his correcting instruction effectively endorsed rather than condemned counsel's improper comments.

[6] York Fire makes two other submissions on appeal. It submits that the trial judge erred by permitting one of Gilbert's expert witnesses, Dr. Kumbhare, to give an important opinion not contained in his expert report. And it submits that the trial judge erred by failing to order that the statutory accident benefits Gilbert would be receiving for future care costs be held in trust or assigned to York Fire under s. 267.8 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[7] Thus the four issues on appeal are the following:

1. Did the trial judge err by failing to grant York Fire's motion for a mistrial?

2. Alternatively, did the trial judge err by failing to give a proper correcting instruction to the jury?

3. Did the trial judge err by permitting Dr. Kumbhare to give an opinion on a matter not contained in his report?

4. Did the trial judge err by failing to impose a trust or order an assignment of Gilbert's statutory accident benefits for future care costs?

I. Did the trial judge err by failing to grant York Fire's motion for a mistrial?

[8] As I said in the overview, after counsel for Gilbert's closing address to the jury, counsel for York Fire asked the trial judge to declare a mistrial. He argued that the closing address was so improper that the prejudice to his client could not be cured by a correcting instruction to the jury. Though unpalatable, he argued, a mistrial was the only appropriate remedy.

[9] The trial judge dismissed the motion. Instead he ruled the fairness of the proceedings could be maintained by a suitable correcting instruction to the jury. In this court, York Fire submits that the trial judge erred by not declaring a mistrial. York Fire accepts that the trial judge's decision to refuse to declare a mistrial is a discretionary decision, and thus is entitled to deference from this court. York Fire must thus persuade this court that the trial judge exercised his discretion unreasonably. In my opinion it has not done so.

(a) <u>The allegedly improper comments of counsel</u>

[10] The closing comments of Gilbert's counsel that York Fire complains of can be separated into three categories: attacks on the integrity of York Fire's counsel; attacks on York Fire's own integrity; and attacks on the integrity of York Fire's expert witness Dr. Benjamin Clark.

[11] York Fire complains about two comments concerning its own counsel:

- "… [he] is mischaracterizing the evidence…"
- "… despite [his] repeated attempts to slant the evidence to suggest that the request for the inside job was because of the grey box incident in November, 2011…"

[12] York Fire also complains about the following comment on its own integrity:

- "I can only suggest to you that York Insurance is not on the search for the truth. Rather, it wants to divert your attention away from the truth, put up some smoke screens, and confuse the real issue by using tactics of selectively cherry picking the evidence to convince you to award as little money as possible."

[13] And York Fire complains that in his closing, Gilbert's counsel attacked Dr. Clark by suggesting that he was "downright deceiving" in his evidence about a work-related incident in December 2010.

[14] Immediately after Gilbert's counsel finished his closing submissions, York Fire's counsel stated his position forcefully: "Any chance of a fair trial has just gone out the window. After all that work of the two weeks, I have to now stand up

and ask for a mistrial because of my friend's comments to the jury that throw me under the bus."

(b) The trial judge's ruling

[15] The trial judge was undoubtedly concerned about some comments of Gilbert's counsel, especially the "possible attacks on the moral character of the defendant, the possible suggestion of improprieties by defence counsel, and the possible inflammatory nature of certain comments." He did not think, however, that these concerns were "on the more serious end of the scale" because counsel's comments were not made "in the air" but were tied to his view of the evidence. The trial judge noted that most improprieties can be addressed by an admonition or correcting instruction to the jury. Only if the prejudice is so serious that it cannot be cured by a correcting instruction should a mistrial be granted.

[16] The trial judge concluded that counsel's improper comments could be dealt with by a correcting instruction. He said "[t]he ultimate concern is integrity of the fairness of the process, and I think that still can be maintained."

(c) Discussion

[17] In three reasonably recent decisions, our court has discussed the role of the advocate in adversarial proceedings, the limits on an advocate's closing address to a civil jury, the remedies available to a trial judge when a closing address is improper, and the scope of appellate review: see *Brochu v. Pond*

(2002), 62 O.R. (3d) 722; *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767; *Fiddler v. Chiavetti*, 2010 ONCA 210, 317 D.L.R. (4th) 385.

[18] The advocate's role for one party in a civil trial is necessarily partisan. Because it is partisan, the advocate has the right, even in some cases the duty, to make an impassioned and zealous address on behalf of a client. The commentary to Rule 5.1-1 of our Law Society's Rules of Professional Conduct puts it this way: "In adversarial proceedings, the lawyer has the duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law."

[19] Because the advocate has this right, even this obligation, courts have understandably given the advocate wide latitude in a closing jury address. But our courts have also recognized that even this wide latitude given to a closing address has limits. One limit is that it is not proper – except perhaps in the rarest of cases – for counsel to impugn the integrity of opposing counsel or even of opposing counsel's client: see *Landolfi*, at paras. 79-80, 91.

[20] Thus, I think the trial judge was right to be concerned about the comments of Gilbert's counsel set out above. They were improper. They exceeded the limits of zealous advocacy. They raised the risk the jury would focus on the character

of York Fire's counsel and his client instead of what the jury should focus on: the evidence.

[21] Faced with an improper closing jury address warranting intervention, a trial judge has a choice of three remedies: caution the jury by giving a correcting instruction, strike the jury and conduct the trial alone, or declare a mistrial.

[22] A mistrial is a remedy of last resort: *R v Toutissani*, 2007 ONCA 773, at para. 9. It results in extra costs and delays the resolution of the parties' dispute. It should only be granted where, as the trial judge correctly said, a correcting instruction to the jury cannot cure the prejudice caused by counsel's improper comments. And because the decision not to declare a mistrial is discretionary, it "attracts considerable deference from this court": see *Landolfi*, at para. 99.

[23] The trial judge's refusal to grant a mistrial was entirely reasonable. To intervene, allow the appeal, and order a new trial, we would have to be satisfied his refusal caused a substantial wrong or miscarriage of justice: see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6). Here, the trial judge's refusal did not cause any miscarriage of justice. The improper comments of Gilbert's counsel were few and were not so serious or so prejudicial that they could not be addressed by an appropriate correcting instruction to the jury. Thus, appellate intervention in the exercise of the trial judge's discretion would be entirely unjustified. I would not give effect to this ground of appeal.

II. Alternatively, did the trial judge err by failing to give a proper correcting instruction?

[24] Instead of ordering a mistrial, the trial judge gave a correcting instruction to the jury. York Fire submits that it did not go far enough because it did not condemn counsel's comments. Instead, according to York Fire, the trial judge tacitly approved of those comments. I do not accept York Fire's submission. The trial judge's correcting instruction was fair. No condemnation of counsel's comments was needed.

[25] In *Landolfi*, at paras. 105-6, Cronk J.A. discussed when in the proceedings a trial judge should give the correcting instruction and what it should say. A trial judge should give a correcting instruction right after the closing jury addresses or early in the charge to the jury. The trial judge in this case met that requirement. He gave his correcting instruction right at the beginning of his charge to the jury.

[26] Ideally, a correcting instruction should have four components. It should:

- be clear and unambiguous;
- point out to the jury the offending comments;
- explain that these comments are improper and why they are so; and
- instruct the jury to disregard the comments and base its findings and decision solely on the evidence.

[27] The trial judge has considerable scope in fashioning a correcting instruction. An appellate court should not intervene unless the interests of justice require it to do so.

[28] The trial judge's correcting instruction included the four components I have set out above. His instruction was clear and unambiguous. He explicitly pointed out the comments of Gilbert's counsel that improperly attacked the integrity of York Fire and its counsel. He told the jury those comments were wrong and emphasized York Fire's counsel "has done absolutely nothing improper". Nor, the trial judge told the jury, was York Fire itself acting improperly. And the trial judge explained why:

> In their closing efforts at persuasion, lawyers are given significant latitude to make their case as they see fit. They have the right, and in some cases the duty, to make impassioned addresses on behalf of their clients.
>
> However there are limits. For example, they are to avoid making comments that might impede your objective consideration of the evidence and encourage you to make an assessment based on emotion or other irrelevant considerations, even if that is not the lawyer's intention.
>
> …
>
> …It is the very nature of persuasion and advocacy to select, emphasize and focus on evidence and considerations that favour one's case. Litigants and counsel inherently do this all the time. Both sides effectively have done so in this case. Doing so is neither improper, nor an indication of any desire to avoid a search for the truth.

[29] Finally the trial judge told the jury to disregard the improper comments and make its decision solely on its view of the evidence:

> The fundamental thing for you to bear in mind is that none of these suggested considerations should in any way distract you from your duty. And again, that duty is to decide the issues before you, based solely on your view of the evidence, and in a manner that is, again, completely fair, objective, and impartial, and without regard to any emotion, passion, sympathy, or prejudice.

[30] York Fire nonetheless argues that the trial judge should have expressly condemned the comments of Gilbert's counsel, and instead of doing so effectively approved of them. It objects to the very last part of the trial judge's correcting instruction, where he said:

> Nor should anything that I am saying right now suggest any such sympathy or prejudice for or against any party or lawyer. My purpose is neither condemnation nor endorsement. It is simply to keep you focussed on your duty.

[31] I do not agree with York Fire's argument for two reasons. First, the trial judge had already told the jury the comments were "wrong". He did not have to go further and expressly condemn those comments or admonish Gilbert's counsel. I agree with LaForme J.A. who rejected a similar argument in *Fiddler*, at para. 48:

> The trial judge thus not only turned her mind to the issue, but gave the jury explicit instructions to disregard the impugned comment. In my view, this was an adequate response to avoid any substantial wrong or miscarriage of justice that may have resulted from the

> comments. It was not necessary for the trial judge to go further and expressly admonish counsel. That was for the trial judge to determine. She was best placed to evaluate the atmosphere in the courtroom and what was needed to ensure that the jury understood its task and how that could best be achieved in a way that was fair to the parties. Her judgment in this respect deserves deference in this court.

[32] Second, I do not read the trial judge's closing direction to the jury to be a tacit approval of the comments of Gilbert's counsel. The trial judge had already told the jury he did not approve of them. In his final direction he was just emphasizing that the jury should focus not on those comments, but on the evidence in the case.

[33] The trial judge's correcting instruction fully satisfied the interests of justice. I would not give effect to this ground of appeal.

III. Did the trial judge err by permitting Dr. Kumbhare to give an opinion on a matter not covered in his report?

[34] Gilbert called as one of his expert witnesses a physiatrist, Dr. Dinesh Kumbhare, who gave an opinion that Gilbert's injuries were caused by the car accident. In November 2011, about 18 months after the accident, Gilbert developed back pain after bending down to open the door of a grey mailbox, which had fallen to the side of the road. He even made a workers' compensation claim after the incident, but the file on his claim was not given to Dr. Kumbhare before he produced his report.

[35] During Dr. Kumbhare's examination-in-chief, Gilbert's counsel sought to ask the doctor whether the grey box incident would change his opinion on the cause of Gilbert's injuries. York Fire's counsel objected to the questions on the ground that Dr. Kumbhare had not addressed the grey box incident in his report, even though this incident went directly to the central issue at trial – causation.

[36] The trial judge permitted the questions. He accepted that Dr. Kumbhare did not refer to the grey box incident in his report. But he viewed the matter "as a trial fairness issue". As the trial judge pointed out in his ruling, the impact of the incident on Gilbert's damages claim was "clearly relevant". The trial judge did not think that Dr. Kumbhare's opinion on the incident would come as much of a surprise. And indeed it did not. Dr. Kumbhare testified that the grey box incident would not change his opinion on causation.

[37] York Fire submits that the trial judge erred by allowing Dr. Kumbhare to give opinion evidence on the grey box incident. I do not agree. The trial judge exercised his discretion reasonably in allowing the questions. Each party was aware of the other's theory on the grey box incident. York Fire's own expert, in his report, had given an opinion on the incident. As the trial judge recognized, it would have been unfair to preclude Gilbert's expert from also giving an opinion on the incident. And the trial judge addressed any concern that York Fire might be prejudiced by the absence of any reference to the incident in Dr. Kumbhare's report: he gave York Fire's counsel the opportunity to request additional time

before cross-examining Dr. Kumbhare. Not surprisingly, no request was made. I would not give effect to this ground of appeal.

IV. Did the trial judge err by failing to impose a trust order in assignment of Gilbert's statutory accident benefits for future care costs?

[38] The jury awarded Gilbert a total of $57,250 for future care costs, which consisted of "future treatment, medication, rehabilitation intervention and aids." In addition to this damages claim in the tort action, Gilbert had a separate accident benefits claim for future care costs.

[39] After the jury's verdict, the insurer brought a motion under ss. 267.8(9), (10) and (12) of the *Insurance Act* for an order requiring Gilbert to hold the statutory accident benefits in trust for York Fire or an order assigning to York Fire his right to those benefits. The trial judge, in thorough reasons, dismissed the motion: *Gilbert v. South*, 2014 ONSC 3485, 120 O.R. (3d) 703. York Fire submits that the trial judge erred in failing to grant the relief it sought. I would not give effect to this submission. Instead I agree with the reasons of the trial judge and will add only brief reasons of my own.

[40] Section 267.8(9) 4. obligates a plaintiff to hold in trust accident benefits for health care expenses:

> (9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use

> or operation of an automobile shall hold the following amounts in trust:
>
> …
>
> 4. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of expenses for health care.

[41] Section 267.8(10) provides for the payment of these trust monies to a defendant in the tort action:

> A plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action, in the proportions that those persons paid the damages.

[42] Section 267.8(12)(a)(vi) permits a trial judge to order that statutory accident benefits for health care expenses be assigned to the defendant ordered to pay damages in the tort action:

> (12) The court that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, on motion, may order that, subject to any conditions the court considers just,
>
> (a) the plaintiff who recovered damages in the action assign to the defendants or the defendants' insurers all rights in respect of all payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action,
>
> …
>
> (vi) for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care…

[43] The purpose of these statutory provisions is to ensure that a successful plaintiff in a tort action is not over-compensated by the receipt of collateral

benefits – in other words, to ensure that the plaintiff does not obtain "double recovery": *Sutherland v. Singh*, 2011 ONCA 470, 106 O.R. (3d) 553, at para. 18. In his ruling the trial judge set out – correctly in my opinion – the principles governing the imposition of a trust or an order for an assignment under the provisions of s. 267.8, at para. 9:

> - "The provisions assume that the plaintiff has obtained, through the litigation, damages covering the same loss otherwise covered by the collateral benefits…"
>
> - "However, concern to ensure mandated prevention of such double-recovery is balanced by concern that a plaintiff should receive full compensation and not recover less than that to which he or she is entitled; i.e., by being subjected unfairly to deductions based on collateral benefit entitlements that are in doubt and/or which may not truly overlap with sums recovered in a tort judgment."
>
> - "If there is uncertainty as to a plaintiff's receipt of such benefits, the value of the benefits entitlement, and/or the extent (if any) to which recovered tort damages relate to the same type of expense covered by the benefits received, matters are not 'beyond dispute' in the sense required for a deduction, and no deduction should be made."

[44] In short, the insurer can only obtain an assignment of a plaintiff's future no fault or collateral benefits if:

- The jury's award mirrors the collateral benefit sought to be assigned. In the words of Finlayson J.A. in *Bannon v. Hagerman*

Estate (1998), 38 O.R. (3d) 659 (C.A.), at p. 679: “I believe that, where possible, any no-fault benefit deducted from a tort award under s. 267(1)(a) must be deducted from a head of damage or type of loss akin to that for which the no-fault benefits were intended to compensate. In other words, and employing the comparison of Morden J. in *Cox*, *supra*, if at all possible, apples should be deducted from apples, and oranges from oranges.”

- And, there is no uncertainty about the plaintiff’s entitlement to these collateral benefits. As Goudge J.A. said in *Chrappa v. Ohm* (1998), 38 O.R. (3d) 651 (C.A.), at p. 657: “If there were uncertainty about the receipt of those future payments the deduction of their present value would expose the plaintiff to the possibility of an ultimate recovery less than that awarded to him.”

[45] York Fire cannot meet these requirements. It did not raise Gilbert’s accident benefits entitlement during the trial. It led no evidence from a future care cost expert. And it led no evidence of the present value of Gilbert’s claimed future care costs. Thus, the record left the trial judge with considerable uncertainty whether Gilbert’s entitlement to accident benefits mirrored the jury’s award for future care costs.

[46] As the trial judge pointed out, this uncertainty had both a timing and a qualitative aspect. On timing, for example, as Gilbert did not claim to be catastrophically impaired, his entitlement to medical and rehabilitation benefits under his accident benefits policy could not extend beyond the earlier of the receipt of benefits totalling $100,000 or ten years from the date of the accident (April 2020). Yet, in awarding damages for medical and rehabilitation benefits, the jury was not asked to differentiate between future medical and rehabilitation expenses during the ten-year period Gilbert would be entitled to accident benefits and those expenses outside the ten-year period.

[47] Qualitatively, the jury was simply asked to make a global award for future care costs, not to allocate damages to particular items of future care. Thus, although some overlap might be likely, the trial judge could not determine what amount of damages for future care costs would overlap with items of Gilbert's future treatment covered under his statutory accident benefits policy.

[48] In summary, the trial judge could not accurately determine what, if any, portion of the jury's future care costs award mirrored expenses that Gilbert was entitled to claim under his accident benefits policy. He therefore dismissed York

Fire's motion for relief under s. 267.8 of the *Insurance Act*.[1] He did not err in doing so. I would not give effect to this ground of appeal.

Conclusion

[49] I would dismiss York Fire's appeal. If counsel cannot agree on the costs of the appeal, they may make brief submissions in writing within two weeks of the release of these reasons.

Released: October 27, 2015 ("J.L.")

"John Laskin J.A."
"I agree P. Lauwers J.A."
"I agree. C.W. Hourigan J.A."

[1] Section 267.8(9) requires that any statutory accident benefits a plaintiff receives be held in trust. The trial judge, however, concluded that it was not possible to determine what, if any, portion of the damages award would overlap with Gilbert's entitlement to statutory benefits. Thus, in the absence of a settlement between the parties or an order stating otherwise, Gilbert is entitled to his statutory accident benefits as part of his full compensation for his injuries.