COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wang v. Niu,*
2023 BCCA 153

Date: 20230406
Docket: CA48374

Between:

Bin Wang

Appellant
(Plaintiff)

And

Junfeng Niu

Respondent
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Grauer
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated June 3, 2022 (*Wang v. Niu*, 2022 BCSC 1027, Vancouver Docket S198418).

Oral Reasons for Judgment

Counsel for the Appellant:	D. Sue-A-Quan T. Luo, Articled Student
Counsel for the Respondent:	S. Sidhu D.J. Preston
Place and Date of Hearing:	Vancouver, British Columbia April 4, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 6, 2023

Summary:

The plaintiff and defendant were involved in a fight in which both suffered injuries. The defendant was charged with assault causing bodily harm and pleaded guilty. Each man commenced a civil action for battery. The plaintiff sought judgment on liability on a summary basis, contending that the defendant's guilty plea in the criminal trial was conclusive on the issue of liability. He contended that provocation, which he conceded remained a live issue, went only to quantum of damages, and not to apportionment of liability. The judge declined to grant judgment on a summary trial, finding that issues of liability and quantum should not be severed. Held: Appeal dismissed. The matter was not amenable to summary judgment, and the judge's view that liability and quantum should be decided together was amply supported. On a review of the case law, the Court finds that British Columbia jurisprudence on provocation in a civil context is not completely settled, and the judge was right not to deal with that complex issue on a summary trial.

[1] **GROBERMAN J.A.**: Mr. Wang suffered personal injuries in a physical altercation with Mr. Niu. Mr. Niu was charged with assault causing bodily harm and pleaded guilty. Subsequently, each of the parties commenced a civil action against the other for battery.

[2] The parties appeared in Supreme Court on cross-applications. Mr. Wang applied for judgment on the issue of liability, either under Supreme Court Civil Rule 9-6 ("summary judgment") or Rule 9-7 ("summary trial"), and for an order severing the issue of quantum of damages for trial. He contended that Mr. Niu's guilty plea on the criminal charges was conclusive of the issue of liability. In the other action, Mr. Niu applied for an order that the two actions be tried together and for associated directions.

[3] The judge dismissed Mr. Wang's application, refusing to grant judgment on a summary basis and declining to sever the issues of liability and quantum. Her view was that the circumstances of the case did not weigh in favour of severing liability from other issues in the case. She considered that liability and quantum should be determined together. The judge granted Mr. Niu's application, ordering that the two actions be tried together. That order has not been appealed, and we are told that the matters are to be heard at trial, together, in September.

[4] While the appellant acknowledges that the decision of the chambers judge was a discretionary one, he contends that she proceeded on a misapprehension of the law. He says that in a civil claim for assault, provocation is not a matter to be considered in determining liability, but rather a matter going to mitigation of damages. Had the judge not misapprehended the law, he says, she would have found that he was entitled to judgment on the issue of liability.

[5] In my view, the judge made no reversible error in exercising her discretion against severance of issues of liability and quantum. Further, while it is unnecessary to decide the issue on this appeal, it is strongly arguable that the issue of provocation is a matter going to liability rather than to quantum of damages.

The Events Giving Rise to the Litigation

[6] On June 18, 2018, Mr. Niu was a guest at a social gathering at Mr. Wang's home. Both consumed a considerable amount of alcohol. The two men got into an argument followed by a violent confrontation. While the full details will have to be determined at trial, it is apparent that during the altercation, Mr. Niu struck Mr. Wang with a sharp metal object—probably a cleaver—causing him serious injuries.

[7] Mr. Niu was also injured in the altercation. He contends that Mr. Wang commenced the hostilities. He says that, without provocation, Mr. Wang became agitated and threatened him. He says that immediately after he heard Mr. Wang's threats, he was knocked unconscious by a blow to the head. He understands that he was hit with a log and alleges that Mr. Wang was the perpetrator.

[8] Mr. Niu was charged with assault causing bodily harm in connection with the events. His memory of the events is limited, but he accepts that he used a sharp metal object against Mr. Wang and caused injury. He also concedes that the force that he used was not reasonable. He pleaded guilty to the charge, and specifically disavowed any reliance on defences of self-defence or of automatism.

The Civil Claims and the Application Before the Chambers Judge

[9] After the criminal proceeding concluded, Mr. Wang and Mr. Niu each commenced an action against the other, alleging assault. In his response to Mr. Wang's notice of civil claim, Mr. Niu denied that he assaulted Mr. Wang. That position was untenable given Mr. Niu's guilty plea in the criminal proceeding, and it does not appear to be a position that Mr. Niu intends to advance at trial. The chambers judge summarized his actual position as follows:

> [32] In this case, Mr. Niu acknowledges that both his guilty plea and the criminal conviction reflect his participation in and responsibility for Mr. Wang's injuries. However, he argues that the findings of fact on which the conviction was based do not reflect the entirety of the circumstances leading up to the altercation. He argues that those facts which had no bearing on, and were not canvassed or the subject of any factual findings in, the criminal context could nonetheless affect liability in the civil context.
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> [37] In this case, the guilty plea and the conviction were limited to Mr. Niu's admission that he applied excessive force. The reasons do not include findings on the entire factual matrix of the events leading up to the altercation or other specific circumstances of the altercation, including who initiated the altercation or Mr. Wang's service of alcohol to Mr. Niu.
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> [38] Mr. Niu argues that, depending on findings of fact that may be made on those issues that were not decided in the criminal trial, liability in the civil context may be apportioned between Mr. Wang and Mr. Niu, regardless of the criminal conviction. In particular, he argues that the doctrines of social host liability and provocation (as opposed to self-defence which, by virtue of the conviction, impliedly does not apply) may apply to reduce Mr. Niu's civil liability.

[10] Mr. Wang contends that there is no basis in law for any reduction in Mr. Niu's liability based on social host liability. With respect to provocation, his position is that while provocation is a live issue for trial, it is not an issue going to liability, but rather one that affects only the quantum of damages.

[11] The chambers judge considered both of those issues to be unsettled, and declined to grant summary judgment under Rule 9-6.

[12] On the summary trial application under Rule 9-7, the judge considered that it was not appropriate to deal with the issue of liability separately from the other issues in the case:

> [60] Where a party seeks to proceed on only part of a case under R. 9-7, as is the case here, the first question is whether there should be severance at all, and the second is whether R. 9-7 is appropriate: *Chun v. Smit*, 2011 BCSC 412 at paras. 8 and 21.

[13] After citing a number of cases dealing with the discretion to sever issues, the judge said:

> [69] The starting point is that a trial should not be severed, unless there is a real likelihood of a significant saving in time and expense. In assessing this factor, there must be more than a mere assertion that there will be a real likelihood of saving time and expense. There must be case specific information about expected efficiencies: *Nguyen* [*Nguyen v. Bains*, 2001 BCSC 1130] at para. 12.
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> [70] In this case, Mr. Wang was not able to identify any basis on which severing liability from quantum would result in any significant time savings. In fact, if his argument succeeds and Mr. Niu's criminal conviction is determinative of liability in the civil action, very little time will be used to prove liability. On that basis, Mr. Wang concedes that there will be no savings of trial time by having liability determined now.

[14] The judge noted that the issue of provocation would have to be fully canvassed at trial, whether it was a matter going to liability (as Mr. Niu contended), or simply a factor to be considered in the assessment of damages (as Mr. Wang contended). Accordingly, she found, at para. 74, that "the assessment of liability is directly interwoven with the issue of quantum to be determined at trial".

Analysis

[15] The application was brought under Rule 9-6, and, in the alternative, under Rule 9-7. Rule 9-6 deals with summary judgment. The relevant provisions are as follows:

> 9-6(2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.
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> (5) On hearing an application under subrule (2) … the court,
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> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
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> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
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> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
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> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[16] Rule 9-6 is not designed to deal with complex factual issues, or detailed assessments of damages. In this case, as Mr. Wang concedes, there is a genuine issue that must be determined at trial: that of whether, and to what extent, he provoked Mr. Niu's assault on him. That issue, even if it is treated as an issue of "mitigation" rather than of "liability" is not simply an issue to be determined on an accounting or reference. Rather, it will be hotly contested and will have to be determined on a full assessment of the evidence of witnesses. It is not the sort of issue that can be dealt with under the summary judgment rule.

[17] The judge made no error, in my view, in finding that the plaintiff's claim could not be resolved under Rule 9-6.

[18] Rule 9-7 allows for more complex issues to be dealt with in a summary fashion where appropriate. The rule provides for a "trial" in which evidence is given by way of affidavit.

[19] The judge was correct to observe that judgment on an issue will not generally be granted under Rule 9-7 unless it is demonstrated that such a judgment will lead to efficiencies in the legal process. No such efficiencies have been suggested in this case.

[20] Further, the judge made no error in considering the interconnectedness of issues in refusing to exercise her discretion to decide an issue in isolation from other

issues in the litigation. On the face of it, this was not a case in which the issue of liability could reasonably be separated from issues of instigation and provocation.

The Role of Provocation in a Civil Assault Claim

[21] Given that the chambers judge did not err in finding that the claim was not one amenable to be decided under Rule 9-6 and did not err in exercising her discretion against severing off the issue of liability under Rule 9-7, it is not, strictly speaking, necessary to address the issue of how provocation is to be treated in a civil assault claim. Nonetheless, in light of the submissions that have been made, some observations on that issue are in order.

[22] The plaintiff contends that provocation is not an issue relevant to liability for civil assault. He says that it is an issue going only to “mitigation of damages”. He cites several cases, including some appellate authority, that support that proposition.

[23] The proposition is, with all due respect, hard to understand. To the extent that damages in an assault case are compensatory, it is difficult to see how they can be “mitigated” by provocation. Compensatory damages are awarded to compensate a plaintiff for their pain and suffering, loss of amenities, and economic losses consequent on the commission of a tort. The fact that provocation may have been present in an assault case does not serve to reduce the injuries suffered by the plaintiff or the amounts that are required to remedy them. In short, provocation does not appear to be a factor that “mitigates” compensatory damages.

[24] On the other hand, it is easy to understand that provocation can affect a court’s assessment of fault in an assault case. From a practical standpoint, then, it would make sense for provocation to be dealt with in apportioning liability rather than in assessing the quantum of compensatory damages.

[25] Nonetheless, as I have noted, there is a body of case law that supports Mr. Wang’s position that provocation is to be dealt with as a matter mitigating damages rather than a matter going to liability. In A.M. Linden et al., *Canadian Tort*

Law, 12th ed. (LexisNexis Canada, 2022) at §2.06, the authors summarize the law as follows:

> Self-defence is a complete defence and should not be confused with provocation, which is not. Provocation is merely a factor to be considered in mitigation of damages. The principle was outlined by Mr. Justice Beck in *Evans v. Bradburn* [(1915), 25 D.L.R. 611] as follows:
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> > The instinct of human nature is to resent insult in many cases by physical force; and, according to the circumstances, this is more or less generally approved or even applauded, but the law, probably wisely, does not recognize any provocation, short of an assault or threats creating a case for self-defence, as a justification for an assault, but only takes it into account as a circumstance which may reduce culpable homicide from murder to manslaughter, and in all criminal cases involving an assault as a circumstance going in mitigation of punishment, and in civil cases in mitigation of damages.
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> In order to amount to provocation, the conduct of the plaintiff must have been "such as to cause the defendant to lose his power of self-control and must have occurred at the time of or shortly before the assault". Prior incidents would have relevance only "if it were asserted that the effect of the immediate provocative acts upon the defendant's mind was enhanced by those previous incidents being recalled to him and thereby inflaming his passion". One cannot coolly and deliberately plan to take revenge on another and expect to rely on provocation as a mitigating factor.

[26] *Evans v. Bradburn* (1915), 25 D.L.R. 611 long pre-dates modern legislation allowing apportionment of liability in tort cases, so it is understandable that the courts did not wish to treat provocation as a "defence", which would have left a plaintiff with no remedy for their injuries. The idea that provocation was "in mitigation of damages" was, in effect, a halfway house, allowing a court to adjust damages to some extent without depriving a plaintiff of all compensation. Neither *Evans* nor other cases, however, explained how provocation could be said to "mitigate" compensatory damages.

[27] In some jurisdictions, provocation has, indeed, been held not to be available to reduce compensatory damages. The decision of the English Court of Appeal in *Lane v. Holloway*, [1968] 1 Q.B. 379 stands for the proposition that provocation can mitigate only aggravated or punitive damages, and not compensatory damages. That position seems to be in keeping with the concept of "mitigation". It is reasonable to treat provocation as a factor reducing the need to punish a defendant, or as a

factor lessening the aggravated nature of the defendant's actions. Thus, mitigation seems an appropriate concept to apply in respect of those sorts of damages. The Court was consistent in its approach to provocation in *Lane*, holding that not only could provocation not "mitigate" compensatory damages, but also that provocation could not be considered to be "fault" under s. 1(1) of England's contributory negligence legislation, the *Law Reform (Contributory Negligence) Act* 1945.

[28] While Canadian courts had generally allowed provocation to reduce compensatory damages prior to *Lane v. Holloway*, some courts subsequently adopted the *Lane v. Holloway* approach: *Check v. Andrews Hotel Co.* (1974), 56 D.L.R.(3d) 364 (Man. C.A.); *Shaw v. Gorter* (1977), 77 D.L.R. (3d) 50 (Ont. C.A.). The English Court of Appeal, itself, retreated significantly from *Lane v. Holloway* in *Murphy v. Culhane*, [1977] Q.B. 94, in which it allowed compensatory damages to be reduced by reason of provocation. *Murphy* was not, however, universally adopted. Ontario continued to apply the law as set out in *Lane v. Holloway*, as endorsed in *Shaw v. Gorter*—see *Landry v. Patterson* (1978), 93 D.L.R. (3d) 345 (Ont. C.A.) and *Ellis v. Fallios-Guthierrez*, 2012 ONSC 1670. Similarly, the Manitoba Court of Appeal continues to consider *Check v. Andrews Hotel* to be good law: *Ironstand v. The City of Winnipeg*, 2019 MBCA 70.

[29] In *Hurley v. Moore* (1993), 107 D.L.R. (4th) 664, the Newfoundland Court of Appeal weighed in on the issue in a comprehensive judgment. Justice Steele described Canadian law in the area as "muddled". He held that provocation can reduce the amount of compensatory damages as well as aggravated and punitive damages, but failed to offer an explanation of how the concept of "mitigation" can apply to compensatory damages in this context. It is also not clear how the court reached its decision as to the amount of reduction of damages that was appropriate.

[30] The Nova Scotia Court of Appeal followed the approach in *Hurley*, but also failed to explain how the concept of "mitigation" can apply to compensatory damages in this context: *Nichol v. MacKay*, 1999 NSCA 112. In brief reasons in *Hougen v. Kuehn*, 1997 ABCA 325, the Alberta Court of Appeal upheld a reduction in

compensatory damages for provocation, but neither used the word “mitigation” nor set out an approach to quantifying the reduction.

[31] This Court considered the issue in *Bruce v. Coliseum Management Ltd.* (1998), 165 D.L.R. (4th) 472 (B.C.C.A.). The Court purported to accept the approach set out in *Hurley*, but, confusingly, then applied a contributory fault analysis, saying:

> [26] The trial judge concluded that the appellant was 30 percent responsible for the injuries he sustained. An appellate court ought not to vary the apportionment of responsibility or fault found by a trial judge in the absence of strong and exceptional circumstances.

[32] It appears, therefore, that while purporting to accept the proposition that provocation “mitigates” compensatory damages, this Court, in fact, applied a contributory fault approach to the issue.

[33] Unfortunately, then, the law in Canada on the issue of how provocation is to be addressed in civil assault cases is no less “muddled” than it was when *Hurley* was decided. There are at least three different approaches: Newfoundland, Nova Scotia and Alberta all purport to treat provocation as a factor “mitigating” damages, but none have explained the mechanism by which compensatory damages are mitigated, nor have they explained the process for assessment of the “mitigation”. Ontario and Manitoba accept that provocation is a “mitigating factor”, but only to the extent of reducing the punitive and aggravated damages that are awarded against a defendant. Thus, the reduction in damages will be in accordance with an assessment of the degree of aggravation of damages, or the degree to which punishment is required.

[34] British Columbia, while purporting to accept the proposition that provocation “mitigates” damages, has not only failed to explain the concept, but also further muddied the waters by applying a comparative fault approach to the issue, seemingly treating the issue as a matter of liability rather than quantum of damages.

[35] We need not, on this appeal, resolve the difficulties in the law with respect to provocation in civil cases. In my view, the chambers judge was correct to identify the

area as one in which the law of British Columbia is not entirely clear. She was right to have considered it unwise to attempt to resolve the issue on a summary trial. If it is necessary to resolve the issue at all in this case, it should be only after the underlying facts have been determined.

[36] In view of my conclusion that the chambers judge exercised her discretion properly and did not err in law, I do not find it necessary to address the issue of social host liability on this appeal, nor the pleadings issues that have been tangentially raised. I would dismiss the appeal.

[37] **GRAUER J.A.**: I agree.

[38] **SKOLROOD J.A.**: I agree.

[39] **GROBERMAN J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Groberman"