

Court of Queen's Bench of Alberta

Citation: Karadeniz v Intact Insurance Company, 2022 ABQB 201

Date: 20220310

Docket: 1303 00150; 1303 00152; 1303 00376; 1303 00377; 1303 16079; 1303 16080

Registry: Edmonton

Docket: 1303 00150, 1303 00152

Between:

Sezgin Karadeniz

Plaintiff

- and -

Marco Beausoleil and Intact Insurance Company

Defendants

- and -

RBC General Insurance Company

Third Party Defendant

Docket: 1303 00376, 1303 00377

And Between:

SezginMetin Yukselir

Plaintiff

- and -

Marco Beausoleil and Intact Insurance Company

Defendants

- and -

RBC General Insurance Company

Third Party Defendant

Docket: 1303 00150, 1303 00152

And Between:

Andres Alejandro Chirino, also known as Andres Chirinos

Plaintiff

- and -

Marco Beausoleil and Unifund Assurance Company

Defendants

- and -

RBC General Insurance Company

Third Party Defendant

**Memorandum of Decision
of the
Honourable Mr. Justice G.R. Fraser**

[1] The parties come before the Court seeking a determination of the circumstances surrounding a motor vehicle collision that took place at approximately 2:00 am on November 13, 2011. There is no question that on that night a motor vehicle operated by the defendant, Marco Beausoleil, collided with Sezgin Karadeniz, Metin Yukselir and Andres Chirinos in the parking lot of Azucar restaurant. There is disagreement about whether Mr. Beausoleil intentionally caused the collision. His insurance company, RBC Insurance, submits that the collision was intentional and consequently his coverage is limited to \$200,000. The damages claimed by the three plaintiffs exceeds that limit.

[2] Mr. Karadeniz and Mr. Yukselir each had insurance policies with Intact Insurance and Mr. Chirinos had a policy with Unifund Assurance. The policies provided them with coverage in the form of an SEF 44 policy. It is the position of these insurance companies that the collision was not intentional, consequently RBC is liable up to \$1 million, the limit on Mr. Beausoleil's policy. Such a finding would limit their liability under the SEF 44 policies.

Facts

[3] The incident in question took place at 13062 50 Street Northwest, Edmonton Alberta. This is the location of Azucar Restaurant. Mr. Chirinos worked for the restaurant, providing security. The other individuals involved were patrons. At some point, a physical altercation took place between Mr. Beausoleil and Mr. Yukselir. After the altercation, the parties separated, and Mr. Beausoleil left the restaurant and entered his Dodge minivan. He and a friend then waited in the motor vehicle in the restaurant parking lot.

[4] According to various witnesses, about 10 minutes later, Mr. Yukselir and some friends exited the restaurant and started to walk across the parking lot towards his car. As he was walking, he noticed a motor vehicle coming towards him. Mr. Beausoleil was the driver. Witnesses describe the vehicle as speeding up to somewhere between 80 and 100 km/h. It drove towards the pedestrians despite there being empty space in the parking lot. Some of the individuals described the driving pattern as one in which Mr. Beausoleil swerved towards the group of pedestrians. This caused people to jump out of the way, some of them falling. Mr. Yukselir believes the vehicle struck him, despite his efforts to get out of its way.

[5] After possibly striking Mr. Yukselir, the vehicle was set upon by some of his friends. They started to strike the vehicle, punching at the windows. At that point, Mr. Beausoleil chose to reverse the vehicle and drive through the parking lot again. There were options to exit the parking lot without turning around. This time, Mr. Karadeniz was struck. Mr. Beausoleil's vehicle also collided with a parked truck. This collision started a chain reaction which resulted in

Mr. Chirinos being struck. Mr. Beausoleil then drove away from the scene without stopping to check on any of the injured parties.

[6] It is unclear whether Mr. Chirinos was injured when he jumped out of the way of Mr. Beausoleil's vehicle, or when the vehicle turned in the opposite direction and collided with the parked vehicles. Regardless, he suffered a fractured skull and a significant brain injury.

[7] Shortly after the collision, Mr. Karadeniz, Mr. Chirinos, and Mr. Yukselir all filed statements of claim against Mr. Beausoleil. The statements of claim all alleged that Mr. Beausoleil was negligent in his operation of the motor vehicle.

[8] Mr. Beausoleil was criminally charged as a result of these events. He eventually pled guilty to dangerous driving causing bodily harm regarding Mr. Karadeniz and Mr. Chirinos, as well as failing to remain at the scene of the collision. In April 2013, he was sentenced to nine months gaol on the dangerous driving charge and three months consecutive on the failing to remain at the scene.

Analysis

[9] The central question for me to decide is whether the guilty plea to dangerous driving, along with the other circumstances surrounding the incident, are sufficient for the Court to conclude that Mr. Beausoleil intended to cause some sort of loss or damage. Additionally, Mr. Chirinos seeks a determination as to whether the driving forward in the parking lot should be considered as one act, and then travelling the opposite way in the parking lot should be considered as a second, separate act.

[10] The importance of Mr. Beausoleil's intention is due to s 533(2) of the *Insurance Act* which reads as follows:

(2) Unless a contract of insurance provides otherwise, a contravention of any criminal or other law in force in Alberta or elsewhere does not render unenforceable a claim for indemnity under a contract of insurance except when the contravention is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage.

[11] In trying to answer this question, I note that this application comes by way of special chambers. There has been no testimony from anyone; the only evidence comes from affidavits. Additionally, Mr. Beausoleil must have accepted some facts when he entered his guilty plea. Interestingly, those facts have not been put before the Court. Instead, a transcript of Judge Creagh's comments on sentencing was provided.

Guilty Plea

[12] The only allegations that have been proven regarding the incident through the guilty plea are that Mr. Beausoleil operated a motor vehicle in a dangerous manner and by doing so caused bodily harm to Mr. Karadeniz and Mr. Chirinos and that he did not remain at the scene of the collisions. Everything else remains unproven, including the cause of Mr. Yukselir's injuries and Mr. Beausoleil's intention.

[13] The charge of dangerous operation of a motor vehicle requires the Crown to prove that the individual operated a motor vehicle in a manner that was dangerous to the public having regard to all the circumstances. The circumstances include, but are not limited to, the nature, use, and condition of the place where the motor vehicle is being operated, and the amount of traffic that can be reasonably expected be in that location at that time. I note that the wording of the *Criminal Code* section has changed since the time of Mr. Beausoleil's guilty plea.

[14] The test to be applied to the facts is the modified objective one. This requires the trier of fact to consider what a reasonable person in the situation of the driver would have done. Regarding the *mens rea* aspect of the offense, the trier of fact must be satisfied that that the driving pattern amounted to a marked departure from the standard of care a reasonable person would use in those circumstances. It is important to note that no finding of the driver's actual intention is required, only an examination of the driver's actions in comparison with that of a reasonable person in the same circumstances. If the actions are a marked departure from the norm of a reasonable person, the offense is made out.

[15] Judge Creagh, in her sentencing comments, stated that the prosecution conceded that Mr. Beausoleil did not have an intention of causing any injuries. From her reasoning, she appears to have accepted this as a mitigating fact on sentence. It would seem that she accepted that a reasonable person in Mr. Beausoleil's position would not have operated a motor vehicle in the manner that Mr. Beausoleil did. However, there is no finding that he intended to operate the vehicle in a manner that would cause injury to someone. As no transcript has been provided to show what facts Mr. Beausoleil accepted regarding his guilty plea, the facts upon which the guilty plea are based are unknown in this application.

[16] There is no evidence from the transcripts provided to support a finding that Mr. Beausoleil intended to cause loss or damage. The transcript actually supports the position that Mr. Beausoleil did not intend to cause injuries.

Affidavit Evidence

[17] If the guilty plea on its own does not prove Mr. Beausoleil's intent on a balance of probabilities, can the plea in combination with the other evidence prove the intention?

[18] The other evidence comes in the form of affidavits. Much of it comes from a March 26, 2021, affidavit of Mr. Royko, a claims analyst with Aviva Insurance. Aviva bought RBC Insurance, and as a result is now involved in this action. Mr. Royko's affidavit largely consists of his belief, formed after reviewing various documents. He had no direct knowledge of the incident. It is essentially hearsay evidence. He reviewed the Edmonton Police Service report regarding the incident, as well as the included witness statements. They are attached to his affidavit as exhibits.

[19] According to the affidavit, RBC denied insurance coverage to Mr. Beausoleil based on his guilty pleas along with the police file and witness statements. Denial was based on that insurance company's determination that Mr. Beausoleil's actions were intentional. I note that nowhere in Mr. Royko's affidavit does he indicate that he came to the conclusion Mr. Beausoleil's actions were intentional. His affidavit does not indicate who made that decision on behalf of RBC.

[20] The police file, attached as an exhibit, contains statements from many people who were present at the scene. There is a statement from Mr. McMahon, which includes his opinion that Mr. Beausoleil's vehicle swerved with the intent to hit the pedestrians. This appears to be related to the start of the incident when the van was travelling north. His is the only witness statement from someone who was not at the restaurant.

[21] Of all the witnesses, Mr. McMahon was likely the furthest from the collision scene. His statement is about one and a half pages and does not contain a great deal of detail. It does not contain any reasoning about why he believed the van swerved with intent to hit the pedestrians. His statement also contains a sentence indicating that the pedestrians chased the van prior to it reversing direction. There is no comment regarding his belief on the driver's intention when travelling south.

[22] The other witness statements are from people who were at Azucar. They all provide versions similar to the description given by Mr. McMahon. They all seem to agree that the van was chased by pedestrians, and some indicate the van was struck by pedestrians.

[23] The statement of Mr. Echevarra includes his opinion that the driver lost control in the icy conditions. His statement does indicate his belief that the driver was trying to run people over. His statement is approximately one-half page and has few details.

[24] The statement of Mr. Sezgin does contain a brief mention that he believed the van was trying to hit the pedestrians. His statement is also approximately one-half page and has few details. It is also unclear if this statement, dated November 14, 2011, at 12:10 am is related to a statement given by someone with a very similar name on the same date at the same time.

[25] There is a statement from Karatay Cebraill. The statement is about one and a half pages. Interestingly, the handwriting on the first page of the witness statement does not seem to be the same as the handwriting on the second page even though the documents indicate they were written at the same time. The writer describes the van as coming out of nowhere. The writer does state his or her belief that the van was trying to get them, but again there is little detail.

[26] The statement of Sezgin Karadeniz is also written on two separate pages. Again, it is unclear if the same person wrote the first and second pages. It is also unclear if this is a statement given by a separate person, or an update to the statement that seems to be written by Mr. Sezgin.

[27] Many of the statements described the van as travelling between 80 and 100 km/h. Mr. Beausoleil estimated his speed to have been no more than 30 km/h. The vehicle in question was a 2002 Dodge minivan. At least one witness indicates the parking lot was icy. Although not directly stated, it appears from the police report that the parking lot was at most 100 meters long. The starting position of the van is unclear. It seems unlikely that the vehicle could accelerate from stationary to 80 km/h in such a short distance. The agreement of so many witnesses on the range of speed suggests they may have discussed the incident amongst themselves prior to giving the statements.

[28] It is from these brief statements that the parties want the Court to make a finding regarding Mr. Beausoleil's intention. They submit that the Court has the power to make this decision solely on the documentary evidence available. RBC submits that the evidence is sufficient for the Court to find Mr. Beausoleil intended to cause loss or damage. The other parties submit that the evidence is sufficient for the Court to find he did not intend to cause loss or damage.

[29] There are discrepancies in the evidence surrounding the circumstances of events on the night in question. However, even in situations where there are discrepancies in documentary evidence, courts can make findings.

[30] In support of this position, RBC references the case of *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343. The case concerned an application for summary judgment. In its decision, the majority clarifies the test from *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49. In *Hannam*, the court wrote at paragraph 147:

First, this interpretation (Justice Slatter’s summary of the governing principles of *Weir-Jones*) allows a summary judgment court to make contested findings of material facts. This is corollary of Justice Slatter’s statement that “[s]ummary judgment is not limited to cases where the facts are not in dispute”. This is a departure from the traditional understanding that a dispute about a material fact disqualifies an action from the summary judgment process. Second, summary judgment courts should not be reluctant to make material fact findings: Justice Slatter encouraged summary judgment adjudication to hear oral testimony: “[W]here possible findings of fact can and should be made on a summary disposition application”.

[31] Although *Hannam* involved a summary judgment decision, I find its principles can be applied to this application. However, in *Hannam*, there were no material facts in dispute. In this case, the material fact of whether Mr. Beausoleil intended to bring about loss or damage is in dispute.

[32] In support of its position that no finding of intent can be made, Intact cites *Savage and Belecque and Allstate*, 2011 ONSC 2330. In that case, Ellies, J, found at paragraph 72, that a guilty plea to careless driving did not, of necessity, include an intentional act. Although careless driving is a provincial offense and dangerous driving is a *Criminal Code* offense, neither require the proof or admission of an intentional act. As stated above, the modified objective test used for dangerous driving only requires that the driver operated the vehicle in a manner that was a marked departure from the standard of care a reasonable person in the same circumstances. A finding of guilt does not automatically mean there was a finding of intention on the part of the driver.

[33] RBC submits that the evidence before the Court can support a finding that Mr. Beausoleil intended to cause loss or damage on the night in question. I find that the evidence cannot support such a finding. The affidavit of Mr. Royko provides no direct evidence regarding the issue. The witness statements, which are attached as exhibits to his affidavit, also cannot provide the required level of proof.

[34] Although the witness statement forms used by the Edmonton Police Service contain a warning stating, “it is unlawful to make a false report to the police”, the statements are not sworn documents. This reduces both their reliability and credibility. The police report contains an admission from one of the witnesses, Ms. Mursa, that she was not truthful with the police. She lied on her witness statement by providing a false name. Additionally, the level of detail contained in the statements, when looked at as a whole, is not sufficient to prove Mr. Beausoleil’s intent on the balance of probabilities.

[35] I note that all the statements seem to have been given in the early hours of the morning. Many of the statements seem to have been given by individuals who were consuming alcohol on the night in question. There is no information regarding the amount of alcohol consumed, or what effect it might have had on their perception. The individuals may have discussed their evidence prior to giving the statements.

[36] The statements provide little or no information as to the individuals' vantage points regarding the observations. There is little or no information regarding distance, lighting, and road conditions. None of the statements are of much assistance in determining whether Mr. Beausoleil's driving pattern that night should be considered as one continuous act, or two separate actions.

[37] The witness statements all generally agreed that Mr. Beausoleil's vehicle was set upon by at least some of the people in the parking lot. Exactly what was done to the vehicle is unclear. This may add some credibility to the position that Mr. Beausoleil was fearful and did not intend to hurt anyone.

[38] The police report indicates that two of the witnesses, Mr. Yukselir and Mr. Seyhanlioglu, gave additional statements November 28, 2011. Two pages of those statements seem to be drawings of the scene with no explanation. There is an additional page with a three-line statement. It indicates that it is page 2 of 2, but page 1 of 2 does not seem to be included.

[39] There are many issues arising from the police report and witness statements that require more explanation.

[40] Mr. Beausoleil turned himself into the police on the evening of November 14, 2011. After his arrest, he provided a written statement to the police in French. That statement does not seem to be included as an exhibit to Mr. Royko's affidavit.

[41] After providing the written statement, Mr. Beausoleil gave a verbal statement to Officer Fay. Officer Hamel acted as translator. According to Officer Fay's December 8, 2011, follow-up report, in that verbal statement, Mr. Beausoleil claimed that he was not speeding and that he did not intend to injure anyone. Although it does not appear that Mr. Beausoleil was giving sworn evidence in his verbal statement, he had been advised of his *Charter Rights* and cautioned. He also had the opportunity to speak to a lawyer. The gravity of the situation should have been evident to him. This may give his statement more weight.

[42] The monitor notes from Mr. Beausoleil's interview indicate that he was told there were skid marks in the parking lot. It is unclear if this was an interview tactic, or if there actually were skid marks in the parking lot. If there were, their location and length might provide further insight into the matter.

[43] RBC submits that I should infer from Mr. Royko's affidavit that Mr. Beausoleil had an intention to cause loss or damage. Regarding Mr. Beausoleil's statement, RBC seems to submit that since there are witness statements that contradict his version of the events, his version to be given no weight. In making this submission, it seems that RBC is carefully picking and choosing parts of the statements. It submits that the Court should rely on some aspects, and disregard others. Although ultimately that is what a court will have to decide, it is impossible at this stage to properly evaluate the reliability and credibility of the evidence from the brief written statements.

[44] RBC also points to Mr. Beausoleil's failure to provide an explanation for his actions as a reason to disregard his statement. However, this overlooks Mr. Beausoleil's explanation that he was fearful of the group of people exiting the restaurant. There is some evidence to support his explanation. He was involved in a physical altercation prior to the driving, and his vehicle, at some point, was attacked by the pedestrians.

Decision

[45] I find that the issue of Mr. Beausoleil's intent on the night in question should be determined through a trial of the matter.

[46] Using the test from *Weir-Jones*, I do not have sufficient confidence in the record such that I am prepared to exercise my judicial discretion. Mr. Beausoleil's intention on the night in question is still to be determined. He may have intended to cause the damage. He may have been scared and did not intend to hurt anyone. Until the evidence is tested and evaluated, his intention cannot be known. For the same reasons, I find that I cannot determine from the record whether Mr. Beausoleil's actions on the night in question should be considered as one continuous action, or two separate acts.

[47] I find that the only way a trier of fact could reach a conclusion regarding Mr. Beausoleil's intention, and the nature of his actions, would be through oral evidence. The evidence given in the witness statements should be tested through examination and cross-examination, as should Mr. Beausoleil's statement.

[48] RBC has submitted that Mr. Beausoleil and some other witnesses have disappeared and are unlikely to be located. Also, given the passage of time, the witnesses may have little direct memory of the events. I find that these factors should not have an influence on the *Weir-Jones* test. The possible absence of important witness for trial, or the possible limited memory of a witness at trial are not factors that should be considered at this stage of the proceedings. They are mere possibilities, what may happen at trial is unknown.

[49] The Statements of Claim allege that Mr. Beausoleil was negligent in the operation of his motor vehicle. There is certainly a possibility that this negligence can be proved at trial. RBC is relying on the exclusionary provision contained in s 533 of the *Insurance Act* to avoid its duty to defend Mr. Beausoleil. The onus is on RBC to show that this section applies. I have found that the application of this section is still to be determined.

[50] In *IT Haven v Certain Underwriters at Lloyd's*, 2020 ONSC 7835, the court dealt with a similar issue. Lloyd's submitted that it did not have a duty to defend due to a breach of its policy. The court found that the determination whether a breach had occurred should be determined at trial. As a result, Lloyd's had a duty to defend.

[51] In *Kostic v CIBC Trust Corporation*, 2018 ABCA 355, the court cautioned against making preliminary or *prima facie* determinations on an incomplete and contentious record.

[52] In this case, I have found that the issue of Mr. Beausoleil's intention should be determined at trial. This is due to the incomplete and contentious record. Consequently, I find that RBC has a duty to defend Mr. Beausoleil in these actions. The extent of RBC's liability is something that will have to be determined at the trial of the matter.

Heard on the 28th day of September, 2021.

Dated at the City of Edmonton, Alberta this 10th day of March, 2022.

G.R. Fraser
J.C.Q.B.A.

Appearances:

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