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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Head v. John Doe,*
2024 BCSC 692

Date: 20240426
Docket: M185379
Registry: Vancouver

Between:

Arthur Ari-Douglas Head

Plaintiff

And

John Doe and Insurance Corporation of British Columbia

Defendants

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

In Chambers

The Plaintiff, appearing in person:	A. Head
Counsel for the Defendant, Insurance Corporation of British Columbia:	I. Jung
Places and Dates of Hearing:	Port Coquitlam, B.C. October 3, 2023 Vancouver, B.C. November 7, 2023
Place and Date of Judgment:	Vancouver, B.C. April 26, 2024

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Introduction

[1] The defendant, Insurance Corporation of British Columbia ("ICBC"), applies pursuant to Rule 9-7, the summary trial rule, of the *Supreme Court Civil Rules* to dismiss this action.

[2] In this action, Mr. Head alleges that an unidentified motorcycle, being operated in a negligent manner by a John Doe, attempted to pass him causing a collision which forced him off the highway.

[3] ICBC acknowledges that Mr. Head was injured when his motorcycle left the highway. However, it says that GoPro video footage it has obtained from a witness, Mr. Johnston, shows conclusively that Mr. Head's leaving the highway was not caused by any other motorcycle or driver.

Background Facts

[4] On or about April 16, 2017, Mr. Head was operating a yellow 2009 Harley Davidson and was travelling with a group of other motorcyclists on Highway 1 south of Boston Bar, BC. Mr. Head was driving on the right of the right lane. He was injured when his motorcycle left the highway. He suffered significant injuries, including some memory loss.

[5] Among the motorcycles behind Mr. Head was one driven by Mr. Johnston. Mr. Johnston braked suddenly upon seeing the plaintiff leave the highway. He was hit from behind by yet another of the motorcycles, driven by a Mr. Ash.

[6] The result has been a series of court actions. Mr. Johnston sued Mr. Ash. Mr. Ash sued Mr. Johnston. And Mr. Head sued ICBC, alleging that Mr. Head:

> … was operating a motorcycle in a careful and prudent manner, in a northbound direction on Highway No. 1, at or near the Town of Boston Bar … when suddenly and without warning, an unidentified motorcycle, being operated in a negligent manner by the Defendant, John Doe, in a northbound direction on Highway No. 1, attempted to pass the Plaintiff causing a collision which forced the Plaintiff's motorcycle off the highway.

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[7] The action was commenced pursuant to the then-applicable provisions of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, which allowed a tort claim to be commenced against ICBC as a nominal defendant where the names of the owner and driver who caused an accident were unascertainable.

[8] The plaintiff was injured in two subsequent motor vehicle accidents – one on September 1, 2017; the other on January 8, 2018. He has commenced actions in respect of each of those accidents as well. Liability has been admitted in respect of the September 2017 accident, but not in respect of the January 2018 accident. On March 16, 2020, a consent order was made that all three actions would be heard at the same time.

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Course of the Litigation

[9] This action was started on April 5, 2018. From the summer of 2018 until about October 2022, the plaintiff was represented by a lawyer, Mr. Shane.

[10] In June 2021, ICBC became aware that Mr. Johnston had GoPro camera video footage from April 16, 2017. It obtained an electronic file from Mr. Johnston's legal counsel, said to contain that video. Mr. Johnston's counsel also provided a copy of the electronic file to Mr. Head's lawyer, Mr. Shane.

[11] On January 17, 2022, Mr. Johnston was examined for discovery in the two legal actions involving Mr. Ash. In advance of that examination for discovery, and at the instance of ICBC, a consent order was obtained in this action providing for Mr. Johnston to be examined under oath pursuant to Rule 7-5(1) on January 17, 2022. What actually happened on that day is that ICBC's lawyer attended the examination for discovery, then at the conclusion of the examination of Mr. Johnston by Mr. Ash's lawyer, ICBC's lawyer asked a number of questions that relate to Mr. Head. Mr. Head's lawyer did not attend the examination.

[12] On July 26, 2022, ICBC filed a Notice of Application seeking to have this action dismissed on a summary trial basis. The application materials were served on Mr. Shane on August 4, 2022. The hearing was scheduled for November 2, 2022.

[13] On October 6, 2022, Mr. Shane advised ICBC's lawyer that he would be withdrawing as counsel for Mr. Head in this action. He filed a Notice of Intention to Withdraw as counsel in this action. While it is not clear whether this withdrawal was ever perfected, the parties have since the fall of 2022 proceeded on the basis that Mr. Head is self-represented in this action.

[14] Mr. Shane continues to act for Mr. Head in the two actions arising from the accidents in September 2017 and January 2018.

[15] Mr. Head made various efforts to retain a new lawyer but was unsuccessful.

[16] On November 2, 2022, Justice Blake adjourned the application to December 5, 2022, and set out a schedule for responding materials to be filed.

[17] On November 25, 2022, Mr. Head filed a handwritten Application Response. In that application response, he raised concerns about the chain of custody with respect to the video evidence.

[18] On December 5, 2022, Justice Walker ordered that this application be adjourned to February 2, 2023.

[19] ICBC retained an expert, David McKay of Blackstone Forensics Ltd., to analyze the video evidence that had been obtained from Mr. Johnston. Mr. McKay prepared a report in January 2023, which was served on Mr. Head on January 19, 2023.

[20] The summary trial application was heard by Justice Coval on February 2, 2023. At that hearing, ICBC was relying on the witness examination of Mr. Johnston, a copy of the video, and Mr. McKay's report. Justice Coval pointed out to ICBC's lawyer that a transcript of a witness examination obtained pursuant to Rule 7-5 is, in effect, hearsay evidence not admissible at a summary trial: see *Western Delta Lands Partnership v. 3557537 Canada Inc.*, 2000 BCSC 54 at para. 46. The application was adjourned to allow ICBC to consider its position.

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[21] ICBC then obtained an affidavit from Mr. Johnston, the contents of which I will discuss later. Mr. Johnston's affidavit was sworn on February 15, 2023. ICBC also filed an Amended Notice of Application which it then served on Mr. Head.

[22] On July 27, 2023, Mr. Head filed a revised Application Response and a handwritten affidavit. Unfortunately, the affidavit simply attached documents intended to support issues Mr. Head wanted to raise and did not contain his evidence with respect to what occurred on April 16, 2017.

[23] The revised application came on before Justice Funt on August 9, 2023. By this time, the application materials comprised much of a large binder. Justice Funt concluded that the application was not something that could be heard within the time available. It was adjourned to be heard on October 3, 2023.

[24] The application came on before me on October 3, 2023. Leading up to that, ICBC filed a second amended Notice of Application and Mr. Head filed an amended response to the Notice of Application.

[25] It became clear at the hearing before me on October 3, 2023, that Mr. Head did not realize that the evidence he gave when examined for discovery was not part of the record on the application, and that there was in fact nothing in the record setting out his version of what happened on April 16, 2017. I gave directions for Mr. Head to file an affidavit, and for the hearing to continue on November 7, 2023.

[26] Mr. Head's affidavit #2 was filed on October 23, 2023.

Evidence with Respect to the Accident

Mr. Johnston's Affidavit

[27] Mr. Johnston's evidence is that on April 16, 2017, he was driving a 2009 Harley Davidson with a group of other motorcyclists, including Mr. Head. They were driving northbound on Highway 1 near Boston Bar. He was behind Mr. Head in the moments before the accident and witnessed it as it occurred. With respect to the video evidence, he says:

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> My motorcycle had a dash camera installed. The dash camera is a GoPro Re-PlayXD, Model 01-rpxd1080m and it was purchased in 2014. It was in perfect working order at the time of the Accident and there were no technical issues. The recording was directly saved in "MOV" format onto a chip in the dash camera.
>
> My dash camera recorded the period before, during and immediately after the Accident. The recording was automatically saved as "RPXD6830.MOV" (the "Video") on the device.

[28] With respect to what happened to the video between April 2017 and June 2021, the only evidence tendered is as follows:

> I permitted my lawyer … to share the Video in its original format with [counsel for ICBC] in this action, and I am informed and verily believe that the Video was disclosed to [counsel for ICBC] on or around June 14, 2021.

[29] Attached to Mr. Johnston's affidavit is what he deposed to be a true copy of the video on a USB in its original video format. He states in his affidavit that:

> I have reviewed the Video and I confirm that the footage captured accurately shows the Accident and the immediate aftermath.

[30] With respect to the accident, Mr. Johnston's evidence is that:

a) At the time of the accident, all the other motorcycles ahead were veering left and following the road, but Mr. Head's motorcycle went straight ahead and drifted in the sand to the right of the lane, then tumbled two times on the shoulder area.

b) He did not see anything interfere with the plaintiff's motorcycle in a way that could have caused the plaintiff to lose control.

c) He did not see any motorcycle attempting to pass the plaintiff's motorcycle or force it off the highway.

Mr. Head's Affidavit

[31] In the affidavit filed on October 23, 2023, Mr. Head gives evidence with respect to the events of April 16, 2017. He deposes that he recalls moving toward the left side of the right lane in order to avoid some potholes, that at about the same

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time a motorcycle in the left lane swerved toward him, contacting him and causing him to correct to the right. His motorcycle started to drift to the shoulder of the road, which was covered in sand and salt. He tried to make his way back, but there was another motorcycle beside him who surged toward him, effectively forcing him onto the shoulder as the road curved to the left.

[32] I understand from the plaintiff's submissions that there may have been a time when he did not recall what happened on April 16, 2017. In his affidavit, he deposes that at a subsequent time, he had "a triggered sudden recall" which allowed him to provide the evidence in his affidavit.

The Video

[33] The video is 2:19 in length. A date stamp on the bottom-right corner of the video shows a date of 2014/08/12.

[34] Mr. Head's yellow Harley Davidson is readily identifiable ahead of Mr. Johnston. It is one of about ten motorcycles in view. Initially, the motorcycles are spread out over two northbound lanes. At about the 45-second mark, the road narrows to a single northbound lane as the group approaches the Alexandra Tunnel. As the motorcycles are sharing the one northbound lane, it appears that roughly half are on the right side of the lane (perhaps two to four feet from the right edge) and roughly half are on the left side of the lane (perhaps two to four feet from the yellow line).

[35] At about the two-minute mark of the video, the road widens again so that there are two northbound lanes. As the road widens, Mr. Head can be seen to navigate without issue what appear to be some filled potholes just to the right of the dashed white lines separating the two northbound lanes (the asphalt is a darker colour). Mr. Head's yellow motorcycle stays to the right. It does not appear that any other motorcycle is close to him.

[36] At about the 2:11 mark, the highway curves to the left. Mr. Head can be seen to get closer and closer to the right edge of the right lane. At that point, the nearest

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motorcycles to him are in the left lane. At about the 2:13 mark, Mr. Head can be seen continuing more or less straight as the road gradually curves to the left. He enters the shoulder, which appears to be primarily sand or gravel at this point. His brake lights come on as do those of the motorcycle behind him. At the 2:15 mark, his motorcycle can be seen flipping over above a cloud of dust. The video ends very quickly thereafter.

Expert Evidence

[37] ICBC relies on the expert report of David McKay. Mr. McKay has expertise in the forensic examination and analysis of video evidence. He is Program Head of the Forensic Science and Technology Department at BCIT. He was at one point a forensic video analyst with the RCMP Civilian Police Services. He has provided forensic examination and analysis of recorded evidence through his company since 2008. He has been accepted as an expert by the courts on multiple occasions. I accept him as a properly qualified and independent expert.

[38] Counsel for ICBC asked Mr. McKay to examine the video file obtained from Mr. Johnston to determine whether there are any reliability, accuracy or technical concerns about the video footage.

[39] Mr. McKay noted that upon review the video file was consistent with a video recording from a fixed camera system, with no visible edits, breaks or gaps in the footage that might be present had the video footage been edited or manipulated. He concluded that there had been no obvious editing or manipulation of the video footage.

[40] He noted that the video was recorded at 30 frames per second, and at a resolution of 1920 pixels wide by 1080 pixels high, which is considered high definition and of a broadcast standard. At that level, a frame is displayed every 0.033 seconds.

[41] His analysis included review of the file metadata. His evidence was that if a digital video file is converted, edited or re-formatted its internal metadata will change.

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All devices which are similar in make and model will stamp recorded files with the same type of information when the video is first recorded, and that information can be used to determine whether or not changes have been made to a given file.

[42] Mr. McKay was provided evidence about the particular make and model of camera that was used to create the video file. He purchased an exemplar device of the same make and model for testing purposes. Having examined the metadata produced by the test device, he confirmed that device used to create the video file was in fact a Re-Play XD model as reported by Mr. Johnston. He was also able to confirm that the video file in question was an original recording, opining that if it was not an original recording, there would be numerous differences in certain fields that would be apparent in the metadata between the subject video file and the test recording.

[43] Mr. McKay used a device to extract individual frames over a seven-second time frame leading immediately up to the accident. Having examined those, he concluded that there were no large gaps or timing discrepancies.

[44] He thus concluded that the subject video file was consistent with a continuous recording that was absent of any reliability, accuracy or technical concerns, that it had not been re-formatted, converted or edited, and that it can be considered a "camera original".

Positions of the Parties

ICBC

[45] ICBC submits that the video clearly shows what happened – that is, that Mr. Head's yellow motorcycle failed to curve with the road and then drove into the shoulder. At no time does another motorcycle attempt to pass Mr. Head's motorcycle, collide with it, or force it off the highway.

[46] ICBC submits that the reliability of the video evidence is established by Mr. McKay's opinion. That video evidence makes clear what happened, and to the extent there is any difference between Mr. Head and Mr. Johnston as to what

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occurred, the video evidence enables the court to resolve that conflict. The defendant notes the comments of Dickson J. (as she then was), in resolving issues of liability for a motor vehicle accident by way of a summary trial, in *Nelson v. Lafarge Canada Inc.*, 2013 BCSC 1552 at para. 4:

> [4] Video surveillance recordings are often described to juries as a "silent witness". Depending on factors such as clarity and angle, it may be said that they constitute cogent evidence unsullied by human frailties such as bias, emotion and memory distortion. This case illustrates the truth of such remarks.

[47] ICBC submits that it is appropriate for the court to embark on a summary trial, given that there is cogent evidence as to what happened on April 16, 2017. It submits that it has established the chain of custody of the video through Mr. Johnston's evidence and that it is admissible as real evidence.

[48] ICBC also submits that Mr. Head's evidence is not reliable, given his assertion that he did not remember what happened but had a "triggered sudden recall".

[49] ICBC submits that the mere potential for falsification of electronic evidence is not in itself grounds to conclude that the evidence is not admissible: *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2013 BCSC 2193.

[50] ICBC notes that the plaintiff bears the burden of proving negligence. It submits that the evidence before the court makes clear that Mr. Head drove off the highway, uninfluenced by any other vehicle. At no time, in the moments leading up to this, did any other motorcycle attempt to pass Mr. Head or force him off the highway.

[51] ICBC thus submits that the action should be dismissed with costs.

Mr. Head

[52] Mr. Head argues that there are conflicts on the evidence such that the case is not suitable for summary trial.

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[53] He argues that the defendant has not established a chain of custody with respect to the video evidence that would make it appropriate for the court to rely on that evidence. He relies on a 2011 article that he found online from a CBA PracticeLink newsletter, in which a freelance reporter, Mr. Careless, reports on interviews with two lawyers. Under the heading “Unquestioned Authenticity”, Mr. Careless states:

> We live in an age where recorded video can be edited to rearrange the chronology of events depicted, distort the passage of time, and show events out of sequence and context. The digital recording process, which usually involves ‘compressing’ video data to save hard drive space, can lead to data loss and affect image quality. If the chain of custody of the video evidence is not proven (e.g., because of inadequate documentation) the video evidence can be ‘thrown out of court’.

[54] He also produced various American articles and blog posts that talk about issues of chain of custody under American law.

[55] Mr. Head expresses concern that the original SD card has never been produced and made available for analysis. He says that some of his friends had copies of the video while Mr. Head himself was still in hospital, and raises the question of who had custody of the camera while Mr. Johnston was in hospital. He says there is no explanation as to why ICBC did not receive the video until 2021 – over four years after the accident. He references s. 13.1 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which imposes on “any person seeking to admit an electronic document” in a proceeding governed by that Act “the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be”. Mr. Head was not aware that the present proceeding is governed by the British Columbia *Evidence Act*, R.S.B.C. 1996, c. 124.

[56] Mr. Head disputes some of the conclusions of the expert witness. He says that Mr. McKay has never reviewed the original SD card and the video on it. He says that he sees a “jump” in the video evidence in this case, which Mr. McKay did not notice. He obtained an information sheet from the internet with respect to a Replay XD1080 Camera, which provides instructions as to how to change the advanced

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settings on a camera through edits to a text file. He compares the Settings text file on this document to a printout of the Metadata file in Mr. McKay's report. He suggests that the Metadata can be saved as a .txt file, which is capable of modification. He also says that Mr. McKay's printout of the metadata is cropped, and thus omits important information. In Mr. Head's opinion, there is a significant possibility of tampering with the video's metadata.

[57] Mr. Head suggests that there are differences between what Mr. Johnston says in his affidavit and what he said (a) to the RCMP at the time of the accident, and (b) when he was examined under oath in January 2022.

[58] The RCMP occurrence report from April 16, 2017, reports that Mr. Johnston told the officer:

> - I was near the back of the group of about 12 riders
> - The yellow bike drifted in the sand, to the right and tumbled about 2 times
> - I hammered on the brakes cause I knew he was in trouble, then BANG
> - I was rear-ended by the silver motorcycle
>
> …
>
> - The yellow motorcycle was near the back of the group as well

[59] When Mr. Johnston was examined under oath on January 17, 2022, he confirmed that he saw the accident happen in front of him (Q 243) and that the yellow motorcycle was on the right side of the right-side lane (Q 240). Mr. Johnston also said that he did not recall speaking with the police (QQ 247-248). When his attention was drawn to the RCMP occurrence report, he acknowledged that he had given a statement to the police, and confirmed that what the police officer recorded was accurate (QQ 251-253). Mr. Johnston confirmed that the video accurately showed what happened to the yellow motorcycle (Q 263). He says that he did not see another motorcycle attempting to pass the yellow one (Q 265-266). At Q 271, Mr. Johnston was asked what, from his knowledge, caused the accident involving the yellow motorcycle. Mr. Johnston responded:

> That I don't know. He was too far ahead to see what was going on until he went in the ditch.

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[60] Mr. Head says that the fact that Mr. Johnston did not recall giving a statement to police, when it is clear that he did, calls into question his memory of the event, and that his response to Q 271 demonstrates that he did not really see what happened. He says that these prior statements undercut the reliability of Mr. Johnston's affidavit and demonstrate the need for cross-examination.

[61] The video was dealt with only briefly in Mr. Johnston's cross-examination. He was asked to explain the date on the video. The video itself has a date-stamp of August 12, 2014. Mr. Johnston's evidence was that he did not know how to change the time on his camera, and he did not know why it showed a 2014 date when it was actually taken in 2017 (QQ 261-262).

[62] Mr. Head says that his lawyer did not attend the examination of Mr. Johnston in January 2022, and did not advise Mr. Head that he could attend and ask Mr. Johnston questions.

[63] He submits that, if the court is going to proceed with a summary trial, he should be able to cross-examine both Mr. Johnston and Mr. McKay.

[64] Finally, he submits that, as he views the video, it is consistent with another motorcycle having caused him to leave the highway.

Legal Context

Appropriateness for Summary Trial

[65] Rule 9-7(15) provides that:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and

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(c) award costs.

[66] As can be seen, there are two questions to be considered in determining whether a matter is suitable for summary determination:

a) Is there an adequate evidentiary base for the court to make the necessary findings of fact?

b) Would it be unjust to decide the case on a summary trial application?

[67] The leading case on appropriateness under Rule 9-7 is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.). At para. 48, McEachern C.J. noted that the summary trial rule provides certain safeguards aimed at ensuring the proper attainment of justice, including an extended notice period, the rule that a chambers judge cannot give judgment unless able to find the facts necessary to decide the issues of fact or law, and the ability of a chambers judge, even if able to find the facts, to nevertheless decline to give judgment if it would be unjust to do so.

[68] In *Inspiration Management* at para. 56, McEachern C.J. provided guidance on dealing with conflicting affidavit evidence:

> [56] … Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. For example, in an action on a cheque, the alleged maker might by affidavit deny his signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.

[69] In *Gichuru v. Pallai*, 2013 BCCA 60, the court identified a number of factors at paras. 30-31 that may be considered in determining whether it would be unjust to give judgment on a summary trial:

a) The amount involved;

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b) The complexity of the matter;

c) Its urgency;

d) Any prejudice likely to arise by reason of delay;

e) The cost of taking the case forward to a conventional trial in relation to the amount involved;

f) The course of the proceedings;

g) The cost of the litigation and the time of the summary trial;

h) Whether credibility is a critical factor in the determination of the dispute;

i) Whether the summary trial may create an unnecessary complexity in the resolution of the dispute;

j) Whether the application would result in litigating in slices; and

k) Any other matters which arise for consideration on this important question.

[70] A summary trial is a trial, and would normally give rise to a final order. As a result, any evidence to be tendered must be such as would be admissible at trial, and hearsay evidence is generally not admissible. However, the determination of whether a matter is suitable for summary determination – which must be determined before a decision as to the merits – is not in and of itself a final order, so hearsay evidence may be admissible for purposes of the suitability question: *Calder v. King* (1994), 91 B.C.L.R. (2d) 336 (S.C.); *Charest v. Poch*, 2011 BCSC 1165 at para. 66.

[71] In this case, the evidence of Mr. Johnston's statement to the RCMP and of his examination in January 2022 are both hearsay, and are thus admissible only for purposes of determining suitability for summary trial, and the related interlocutory question of whether cross-examination should be ordered.

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Authentication of Electronic Real Evidence

[72] In *Animal Welfare*, Justice C. Ross considered the admissibility of various electronic records from a database, and excerpts retrieved from the database by way of an SQL query. She described the principles governing admissibility as follows:

> [61] Authentication in this context requires that the Court be satisfied that the records are what they purport to be. W3 submits that the threshold is a low one and can be satisfied by direct or circumstantial evidence, citing *R. v. Wilder*, 2002 BCSC 1333 at para. 288 [*Wilder*].
>
> [62] W3 submits that it is not sufficient for a party opposing admissibility to allege falsification of evidence without more. The mere potential for falsification of electronic evidence is not in itself grounds to conclude that the evidence is not admissible, see: *Bell Express Vu Limited Partnership v. Rodgers* (2007), 52 C.P.C. (6th) 312 (Ont. S.C.J.).
>
> [63] W3 submits further that the authentication threshold does not require parties to show that no one else could have altered the evidence by proving, for example, continuous possession of the evidence in issue and a lack of opportunity for anyone else to interfere with it, citing *Wilder* at para. 289:
>
> > [289] The failure of the Crown to prove continuity of the evidence potentially affects the authenticity of the evidence. However, providing there is some evidence of authenticity, issues of continuity go to the weight of the evidence, not its admissibility. Moreover, Canadian case law makes it clear that proof of continuity is not a legal requirement and that gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity. [Citations omitted]
>
> [64] W3 submits that the reliability component of the principled approach has occasionally been the source of confusion and error on the part of parties opposing admissibility. The question at the admissibility stage does not involve an assessment of the likelihood that the evidence is accurate or true. The Supreme Court of Canada has emphasized that the reliability component of the principled approach involves a much lower standard of "threshold" reliability, as distinct from the "ultimate" reliability, the latter of which relates to the amount of weight to be accorded the evidence once admitted. When assessing the admissibility of a hearsay statement, a trial judge is limited to determining whether there are sufficient indicia of reliability to afford the trier of fact a satisfactory basis to assess the truth of that statement. See, for example, *Starr* at para. 54; and *R. v. Hawkins*, [1996] 3 S.C.R. 1043 at para. 75.

[73] Authentication was considered in the criminal law context in *R. v. C.B.*, 2019 ONCA 380, where Justice Watt said:

> [64] The requirement of authentication applies to various kinds of real evidence. Authentication involves a showing by the proponent of the

> evidence that the thing or item proffered really is what its proponent claims it to be: Kenneth S. Broun, ed., *McCormick on Evidence*, 7th ed., vol. 2 (Thomson Reuters, 2013), at 212, pp. 4-5.
>
> [65] Authentication is the process of convincing a court that a thing matches the claim made about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.
>
> [66] At common law, authentication requires the introduction of some evidence that the item is what it purports to be … The requirement is not onerous and may be established by either or both direct and circumstantial evidence.
>
> [67] For electronic documents, s. 31.1 of the [*Canada Evidence Act* ("*CEA*")] assigns a party who seeks to admit an electronic document as evidence the burden of proving its authenticity. To meet this burden, the party must adduce evidence capable of supporting a finding that the electronic document is what it purports to be. Section 31.8 provides an expansive definition of "electronic document", a term which encompasses devices by or in which data is recorded or stored. Under s. 31.1, as at common law, the threshold to be met [page14] is low. When that threshold is satisfied, the electronic document is admissible, and thus available for use by the trier of fact.
>
> [68] To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does not limit how or by what means the threshold may be met. Its only requirement is that the evidence be capable of supporting a finding that the electronic document "is that which it is purported to be". That circumstantial evidence may be relied upon is well established … This accords with general principles about proof of facts in criminal proceedings, whether the facts sought to be established are preliminary facts on an admissibility inquiry or ultimate facts necessary to prove guilt.
>
> [Citations omitted.]

[74] At para. 78, Justice Watt confirmed that satisfaction of the evidentiary threshold for authentication renders the evidence admissible, in the sense that it is available to the trier of fact for ultimate evaluation. It does not follow from admissibility that the trier of fact must find that the evidence is in fact what it claims to be. It is up to the trial judge to determine the weight to be assigned to the evidence.

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Cross-Examination on Affidavits

[75] Rule 9-7(12) provides that:

> (12) On or before the hearing of a summary trial application, the court may order that
>
> …
>
> (b) the person who swore or affirmed an affidavit, or an expert whose report is relied on, attend for cross-examination, either before the court or before another person as the court directs, …

[76] *Stephens v. Altria Group, Inc.*, 2021 BCCA 396, was an interlocutory appeal from an order that two witnesses be cross-examined on their affidavits in the context of a class action certification application. Justice Fenlon noted at para. 5 factors that have been identified in past cases with respect to determining whether cross-examination should be ordered, including the following three factors from *Greenwood v. Greenwood*, [1999] B.C.J. No. 846 (S.C.) at para. 15:

a) whether there are material facts in issue;

b) whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and

c) whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

She noted as well other cases (including *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995) that have asked, as part of determining whether to order cross-examination:

d) whether the information sought is available through other means, and

e) whether the cross-examination will produce unreasonable delay, or generate unreasonable expense.

[77] The *Stephens* appeal focused specifically on the question of whether there are material facts in issue, and in particular whether that question is determined by

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considering whether there are conflicts in affidavit evidence. Justice Fenlon concluded:

> [7] … the appellant's argument is based on a flawed premise—that "material facts in issue" is synonymous with "a conflict in the affidavit evidence." In support of this premise, Altria relies on *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263, in which Justice Hunter, speaking for the Court, said:
>
> > [61] The chambers judge considered that there were no "contradictions" in the affidavit evidence, but rather statements of opinion or assertion of facts not material to the application to strike …
> >
> > [62] I agree with the chambers judge that it is appropriate to review the contesting affidavits to determine whether there are facts in issue in the relevant affidavit that are contested …
> >
> > [Emphasis added.]
>
> [8] I do not read this passage as standing for the principle that cross-examination may only be authorized when there are conflicting affidavits. Reasons for judgment must always be read in the context of the facts of the particular case and the issues being addressed. *H.M.B*., like many cases involving applications to cross-examine on affidavits, involved directly conflicting affidavits. When contesting affidavits are before the chambers judge, it is indeed appropriate to review them to determine whether there are material facts in issue. The affidavits are one consideration in that assessment; they are not a precondition to the exercise of discretion. Justice Hunter in *H.M.B.* relied in his reasons on the oft-cited passage from *Brown v. Garrison* (1967), 63 W.W.R. 248 (B.C.C.A.), where Justice Bull, speaking for the Court, said at p. 250:
>
> > Clearly, and it has been long so held, the judge has a discretion which he must exercise on proper principles as to whether or not cross-examination should be directed on the application of a party. There is no question that in the normal course where the affidavit on which the cross-examination is sought includes **facts that are in issue**, the deponent will so be ordered to attend if application therefor is sought. …
> >
> > [Emphasis and bold added.]
>
> It is evident from *Brown* and other cases that the question is not whether there are conflicting affidavits, but whether there are conflicting material facts. In my view, that conflict may be grounded in the applicant's pleading. In a jurisdictional challenge, or an application to strike a fraud or conspiracy claim, the plaintiff often will not be in a position to swear to events that are largely within the knowledge of the defendant. It must be remembered that Rule 22-1(4)(a) governs applications to cross-examine on affidavits filed in a wide array of proceedings. The factors to be considered in the exercise of the judge's discretion remain the same, but their application must be sensitive to the context in which the application is brought. As Justice Hunter observed in *H.M.B.*, at para. 61, if the underlying application is one that, if successful, would result in the striking out of the plaintiff's claim without any consideration of its merits, that context may weigh in favour of granting cross-examination.

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Analysis

[78] In my view, this is a case in which, if the court concludes that the video evidence should be considered reliable and given full weight, then it may well be appropriate for the plaintiff's claim to be decided by way of a summary trial. I say that notwithstanding that, with reference to the factors from *Gichuru*, the plaintiff's claim—should he be in a position to establish liability—is likely significant given his injuries, there is no particular urgency, and there is on the face of it a credibility issue with respect to the competing evidence of Messrs. Johnston and Head. On the other side of the *Gichuru* analysis, the question of liability is not complex and would resolve the action in its entirety, and the costs and delay of taking this matter to a conventional trial would be significant.

[79] If the video can be considered to be a reliable "silent witness", unsullied by human frailties, then it will likely be that "other admissible evidence" that will make it possible to find the facts necessary to determine liability. The question, then, is whether the court has sufficient evidence to authenticate the video in order both to determine its admissibility and to determine what weight to assign to it.

[80] In this case, the parties were given an opportunity to make inquiries of Mr. Johnston as to the circumstances surrounding custody of the video in the course of the Rule 7-5 examination. Mr. Head, who was represented at the time, did not take advantage of that opportunity. It is not clear, on the record before me, whether ICBC had given notice at that point of an intention to bring a summary trial application.

[81] At the Rule 7-5 examination, ICBC's lawyer did not address the provenance of the video, other than to ask Mr. Johnston two questions about the 2014 date stamp on the video.

[82] A Rule 7-5 examination is not the only opportunity available under the *Supreme Court Civil Rules* to challenge the evidence of a witness. The *Rules* do provide for cross-examination in respect of applications brought in chambers, where

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appropriate, and in any action going to a full trial, a party is able to cross-examine witnesses called by the opposing party.

[83] In my view, it would be wrong to deprive Mr. Head of the opportunity to cross-examine a key witness on liability on the basis that he should have taken advantage of the Rule 7-5 examination. To second-guess the decision of the lawyer at the time, with the benefit of 20-20 hindsight as to how the case has proceeded over the course of the subsequent two years, and to use that as a basis to deprive Mr. Head of the ability to cross-examine Mr. Johnston, would be unfair to Mr. Head. I take into consideration at this point the possibility that, in the absence of cross-examination, his case could be dismissed without any consideration of the merits: *Stephens* at para. 8.

[84] In my view, there are stark differences between Mr. Head's evidence and that of Mr. Johnston. The video may well be capable of providing the court with a means to resolve those credibility issues, but in my view, there are questions about the provenance of the video during the four years from 2017 to 2021, and a lack of evidence as to how it was copied from medium to medium to the point that it came into evidence at this summary trial. That evidence will go both to the authentication of the video and to its reliability. Mr. Head should have an opportunity to adduce that evidence and put it before the court for purposes of this summary trial application.

[85] Mr. Head should also have the opportunity to cross-examine Mr. Johnston on the issues he has identified with respect to Mr. Johnston's prior statements.

[86] I conclude that there are conflicting material facts and that cross-examination of Mr. Johnston should be ordered.

[87] I do not, however, see a basis on the current evidentiary record for Mr. McKay to be cross-examined. I have viewed the video multiple times and simply do not see the "jump" that Mr. Head says Mr. McKay missed. Nor do I see any merit to Mr. Head's submission in which he compares the Settings text file referred to in the product information sheet (which came from the internet) to the metadata referred to

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in Mr. McKay's report. I see no support for Mr. Head's opinion about the possibility of tampering with the video's metadata.

[88] Depending on what is learned during the cross-examination of Mr. Johnston, it may be that a basis arises for Mr. McKay to be cross-examined. In my view, however, that would have to be determined after such cross-examination and based on the transcript obtained.

[89] ICBC argued in the alternative that, if Mr. Johnston is to be cross-examined, then Mr. Head should also be cross-examined. I agree that is appropriate given that the cross-examination will address in large part the conflicts between their respective affidavits.

Conclusion

[90] I order that the summary trial application be adjourned generally, and that there be cross-examination of both Mr. Johnston and Mr. Head before the application is brought back on.

[91] Either party has liberty to apply should issues arise with respect to the cross-examinations that I have ordered.

[92] Given the extent to which I have already delved into the facts, it is my view that I should be seized of the resumption of the summary trial in this action.

"Veenstra J."

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