CIVIL LITIGATION UPDATE

Harper Grey LLP

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WIDDOWSON V. ROCKWELL

Counsel should be cognizant of the nature of the evidence they are leading by affidavit on a summary trial application. As a general rule, affidavit evidence should be presented in the same manner as oral evidence – in the words of the witness, not counsel. *Widdowson v. Rockwell*, 2017 BCSC 385, provides a cautionary example of affidavit evidence rejected on the basis it did not reflect the evidence of the witness.

By Joel Morris and Ted Murray

In *Widdowson*, the plaintiff was walking home from work along a sidewalk in Port Moody when he was hit by a truck owned by the defendant Ridge Sheet Metal Ltd. and driven by the defendant Rockwell. The plaintiff suffered severe injuries.

Rockwell was highly intoxicated at the time of the accident. Mr. Justice Kent, the summary trial judge, described Rockwell as, "quite literally, falling-down drunk." Earlier that day, Rockwell and three co-workers had visited a pub owned and operated by the defendant Cambie Malone's Corporation ("Cambie Malone's"). The amount of alcohol served and consumed at the pub was central to a summary trial regarding commercial host liability.

On the summary trial application three employees of Cambie Malone's swore affidavits containing identical paragraphs on important substantive issues regarding policies in relation to service of alcohol and the intoxication of patrons on the day in question. The affidavits all stated:

- "Moreover, upon being hired by the Cambie, I reviewed, and agreed to abide by the Cambie's written policies and procedures for serving alcohol (the "Policies and Procedures"). In particular, the Cambie's written Policies and Procedures require all serving staff, including myself, to take care that patrons do not become intoxicated at the establishment. The Cambie's Policies and Procedures further require all serving staff to immediately stop serving an intoxicated patron and take steps to ensure that an intoxicated patron is provided with a safe means of transportation home ..."

- "I would never serve a patron who was slurring her words, staggering, unable to count their money or exhibiting any other signs of intoxication."

- "I did not observe any patrons exhibiting signs of intoxication on February 17, 2012 or serve alcohol to any patrons at the Cambie who were exhibiting signs of intoxication during my shift on February 17, 2012. Had I observed patrons exhibiting signs of intoxication, I would not have served them further alcohol, and I would have taken steps to ensure that the intoxicated patron had a safe ride home, by calling a cab if necessary."

Justice Kent held these paragraphs deserved little if any weight because they were drafted by a lawyer and did not represent the witnesses' own words. With the benefit of cross-examination, he concluded this language did not reflect the witnesses' own evidence, and was in effect "manufactured" by counsel. This was an unacceptable method of adducing evidence. Justice Kent stated:

> [44] These paragraphs deserve little if any weight. They were drafted by a lawyer and purportedly adopted by the witnesses. They clearly do not represent the witnesses' own words. The content is "lawyer speak" not "ordinary person speak". And having observed these various witnesses being cross-examined, it is clear that if asked proper questions on direct examination, none of them would have given this evidence in the same words or syntax found in these paragraphs. These paragraphs are in effect testimony manufactured by counsel, and the use of such identical language in multiple affidavits from different witnesses is simply not an acceptable method of adducing evidence (let alone credible evidence) on a summary trial.

The discussion of affidavit evidence in *Widdowson* is similar to Madam Justice Southin's comments in *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.), over 25 years ago, regarding drafting affidavits for use in summary trials:

This affidavit is a series of conclusions – it is not an account of what took place. I appreciate the difficulty under which a defendant applying under R. 18A must labour in drawing his affidavit. He must go first in adducing evidence although the burden of proof at the trial is on the plaintiff.

But despite that difficulty, his evidence must go to the primary facts in contradistinction to what in the law of pleading are called material facts. Sometimes, of course, the material fact and the primary fact are, for all practical purposes, identical; e.g. there was an accident at a certain time and place. But this is rarely so when an issue is whether laymen have by various discussions and correspondence made a contract in law.

Had this action gone to trial in the traditional way, the defendant would not have given her evidence in chief in the terms of this affidavit. She would have given, in response to questions from her counsel, chapter and verse of what took place between her and the plaintiffs. Affidavits used on applications under R. 18A should be in the words of the witness – not the words of counsel. Counsel in drafting such an affidavit should ask himself what he would have been obliged to ask his client had his client given evidence in chief. That evidence should then, in narrative form, be contained in the affidavit.

Both cases provide guidance regarding how affidavit evidence should be prepared.

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