

CANADA / JUDGMENT

Adams v. Adams

2024 BCSC 1065

COURT

Supreme Court of British Columbia

DECIDED

3 June 2024

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2024 BCSC 1065 Adams v. Adams

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Adams v. Adams,

2024 BCSC 1065

Date: 20240603

Docket: M2010784

Registry: Vancouver

Between:

Maria Teresa Adams

Plaintiff

And

Christopher James Adams, Nissan Canada Inc.,

and Shivani Vora

Defendants

Before: Associate Judge Krentz

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing by videoconference:

M.G. Siren

Counsel for the Defendant Christopher Adams:

No appearance

Counsel for the Defendants Nissan Canada Inc. and Shivani Vora:

T.J. Mueller

Place and Date of Hearing:

Chilliwack, B.C.

May 13, 2024

Place and Date of Judgment:

Chilliwack, B.C.

June 3, 2024

- [1] THE COURT: This is an application by the defendants Nissan Canada Inc. and Shivani Vora (the "applicants") pursuant to Rule 12-5(68) of the Supreme Court Civil Rules that the trial scheduled for October 1, 2024, to assess the quantum of damages, be heard by a judge and jury. The plaintiff opposes the application and the defendant Christopher James Adams takes no position.
- [2] The plaintiff claims damages for injuries resulting from a motor vehicle accident that occurred in December 2018. The notice of civil claim was filed in November 2020. There were five actions that were commenced arising from this motor vehicle accident.
- [3] In one of the related actions, Ms. Gleeson, K.C. as counsel for the same defendants as the applicants herein, filed a case plan proposal and sought orders that the actions be tried together and that the 16-day trial, then set for June 13, 2022, deal firstly with the issue of liability and that there be a subsequent trial on the issue of damages.
- [4] In this action, counsel for the defendant Adams filed a case plan proposal on March 19, 2022, also seeking that the issue of liability be severed from the issue of damages and that the proposed mode of trial be judge alone for the damages trial.
- [5] On April 14, 2022, Justice Tindale conducted the case planning conference and made the following orders. He ordered that all five actions be joined for trial on the issue of liability and that the trial date set for June 13, 2022, be reduced to five days. This was referred to as the 'liability trial'. He further ordered that each of the actions shall have the damages portion severed from the liability portion for trial. He also made other ancillary orders.
- [6] The liability trial proceeded before Justice Ball as scheduled, and his reasons for judgment were issued on November 8, 2022, finding liability equally divided between the defendants Adams and Vora.

- [7] In this action, while judgment on liability was on reserve, the plaintiff filed a notice of trial for January 8, 2024, setting a 10-day trial. On October 6, 2022, Ms. Gleeson filed a notice requiring trial by jury. Until that date, including through the liability trial, the defendants at no point indicated a mode of trial by jury. The defendant Adams specifically indicated as a proposed mode of trial for assessment of damages to be judge alone.
- [8] The case planning proposal filed by the applicants was silent as to mode of trial, so there was no indication they were seeking a jury trial on the issue of the quantum of damages.
- [9] After the January 2024 trial date was set and in preparation for the TMC scheduled for October 24, 2023, counsel discussed concerns about the length of the trial and whether adequate days had been reserved. The trial briefs totalled approximately 52 hours for a 10-day trial. The parties discussed the possibility of adjourning the January 2024 trial in order to add more time.
- [10] On October 23, 2023, the plaintiff's counsel wrote the following to the other counsel:
- I [have] reviewed your TMC brief. If this matter doesn't proceed by jury that should reduce your timing by about 8 hours. We're still a bit tight on time even with that reduction.
- One of my clients concerns about an adjournment is that she is struggling financially, and a lengthy adjournment will exacerbate this. One possible idea is a tort advance if there was going to be an adjournment.
- [11] The next day, the applicants' counsel wrote back:
- Hi Ryan and Matt -
- The court has 13 days for Oct 1 due to Thanksgiving (reason why it's not 15 days).
- I am of the opinion 13 days should suffice as per the case law this will not be a jury trial, thereby reducing the time estimate (no jury permitted where the trial is bifurcated and liability has been tried by judge alone)
- [12] In exchange for the adjournment, it was agreed that the plaintiff would receive a \$12,000 advance.
- [13] The applicants argued at this hearing that the email from their counsel was not admissible, as she indicated within the thread of emails that were being exchanged that her comments with respect to jury trial were 'without prejudice' as she was still seeking final instructions on that issue.
- [14] I do not find that the emails are inadmissible for these reasons: Firstly, it was not a settlement offer. Secondly, the communication was relied upon and acted upon by the other party, namely the plaintiff, so it cannot later be withdrawn.

- [15] In any event, my determination on this issue is not dependent upon counsel's view as to the case law. I find the communication to be admissible and it led to the parties adjourning the trial and resetting it for 13 days.
- [16] On October 24, 2023, the applicants' counsel filed a new notice of trial and the next day, she served a notice requiring a jury trial.
- [17] In seeking a jury trial, the applicants rely upon a decision of our Court of Appeal, *Boyd v. Harris*, [2004] B.C.J. No. 472 (C.A.), which was also an action seeking damages for personal injury resulting from a motor vehicle accident. The Court addressed the important role of juries and said at para. 9:

Because juries are not made aware of the range of awards that trial judges have established in previous cases, common sense and collective values must guide their deliberations. As a result, jury verdicts are unpredictable or, at least, less predictable than those of trial judges. This uncertainty of result inherent in a jury trial of a claim for damages, coupled with the additional costs associated with that mode of trial, must surely spur the parties to reach an accommodation short of trial. Risk, an important factor in settlement negotiations, is amplified when the trial is to be by jury; the range of settlements acceptable to the parties is thereby broadened and settlement prospects are enhanced.

- [18] The applicants submit that proceeding by jury will enhance the prospect of settlement outside of trial and foster a potential trial outcome that is fair, just and reasonable in all the circumstances. They argue the applicants should not be deprived of their right to elect trial by jury, even though the liability trial proceeded by judge alone.
- [19] In opposing a jury trial, the plaintiff submits that in October 2023 she agreed to adjourn the January 2024 trial date to the current date of October 2024, in order to add three days of trial time. The parties agreed that this matter could be successfully heard within 13 days by judge alone. The plaintiff's counsel say they relied on the representation made by the defendants that the matter would be heard by a judge alone and thereby agreed to reschedule the trial.
- [20] The plaintiff further argues that if this proceeds with a jury, it will add an additional two days of trial time and the matter will have to once again be adjourned. The adjournment could be quite lengthy in order to coordinate a 15-day jury trial between counsel and an adjournment would cause significant prejudice to the plaintiff, as she is struggling financially. The plaintiff began working part-time in October 2023, earning approximately \$721 per week. Her rent is \$1,975 per month.
- [21] The parties agree that no cases could be located in which a Rule 12-5(68) order for a different mode of trial was made after the liability trial had concluded. The plaintiff argues that when an order is made for severance and there is no order at that time that there will be a different mode of trial, the default position is that the mode of trial for the second trial would be the same as the first trial.

- [22] The plaintiff argues that the reason for requiring the issue of mode of trial be considered at the same time as the application for severance is apparent in the line of authorities that have been cited by the plaintiff, wherein severance was denied when parties were unwilling to waive a right to a jury trial. For example, in *Anderson v. University of British Columbia*, [1990] B.C.J. No. 2507 (S.C.), the court stated that "a condition for [an] order for severance [is] that the trial of both liability and damages be by judge alone", and if a party was not prepared to waive a right to trial by jury, the court would have refused the severance order.
- [23] In *Gill v. A & P Fruit Growers Ltd.*, 2011 BCSC 1809 [Gill], Justice Schultes heard an appeal of a master's order striking out the jury notice that had been filed by the defendant. In *Gill* a trial on all issues was originally set for February 18, 2008, and a pre-trial conference was held before a master. An order was made severing liability and damages. The master's order stated: "The issue of liability and quantum be severed and tried separately."
- [24] The trial was heard by Justice N. Brown and he found the defendant 70% liable for the accident. The plaintiff served a notice of trial setting the assessment of damages for later that year. The defendant then filed a jury notice for that trial. It is common ground that the defendant was entitled to file a jury notice, as he did so within the required time period.
- [25] Justice Schultes then reviewed the master's decision and stated the following: "In written reasons delivered [the master] acceded to the plaintiff's argument in favour of striking the notice." He found that his order severing the issues did not provide that the first trial would be by judge alone and the second before a jury: (Gill at paras. 10-11).
- [26] At para. 11, Schultes J. referred to another decision of a master and in that application the following was stated:
- At the [pretrial conference] at which the order for severance was made, there was no question that the upcoming trial was to be before a judge alone, no jury notice having been delivered. Neither did the defendant prior to or at that PTC indicate its intention to seek a jury trial with respect to the issue of quantum. Had the defendant done so, I would have declined to sever the issues of liability and damages, bearing in mind the injunction against splitting cases except in exceptional circumstances [Citation omitted.]
- [27] In the appeal before him, Schultes J. stated the following, starting at para. 15:
- [15] I think that the master's reasons for finding the jury notice to be a nullity involved him formulating and applying two propositions of law that the defendant has argued are incorrect.
- [16] The first proposition is that the question of whether different modes of trial are available when issues have been severed is conditioned by the intentions and actions of the parties prior to the order for severance. The second is that there can be but one notice of trial, which governs the mode of trial of any subsequent severed proceeding within the same matter.

- [17] The correctness of these assertions is the central [issue] on this ground of appeal.
- [28] He then dealt with the finding that the jury notice was a nullity. Starting at para. 24, he stated:
- [24] I agree that the wording of an order severing proceedings must be examined to determine whether it was intended by the judicial official who made it to result in (1) two separate trials or (2) the hearing of two issues that are within the same trial but are heard at two different points.
- [25] What is not supported by the authorities, however, is the defendant's further proposition that, after an order that issues be heard separately in relation to a trial that had been set to proceed before a judge alone, a party can, in the absence of further judicial approval, obtain trial by jury of one of the issues simply by serving a jury notice.
- [29] At para. 26, he stated that "At the time of severance the rules governing such an order were Rule 39(29) and (30) of the former Rules of Court. "
- [30] He noted that pursuant to subrule (30):
- (30) The court may order that different questions of fact arising in an action be tried by different modes of trial.
- [31] Schultes J. noted:
- [27] Orders pursuant to subsection (30) were at the crux of the decisions in both [earlier cases of] *Beddow* [*Beddow v. Megyesi*, (1992) 63 B.C.L.R. (2d) 158] and *Fagervik* [*Fagervik (Guardian ad litem of) v. Dzaman*, (1996) 4 C.P.C. (4th) 262].
- [32] I note that the wording in subsection (30) is the same as the current Rule 12-5(68).
- [33] Schultes J. then referred to the two earlier decisions, stating the following:
- [28] In *Fagervik Master Powers*, at the time he granted severance of the issues, quite properly provided explicitly for separate trials of liability and quantum and granted leave for the filing of a jury notice in relation to the hearing of the second issue.
- [29] In this case [before him], the master determined that the conditions for a severance were met pursuant to [the rule]. No jury notice had been served for what had been the single trial on all issues. So, absent specific direction by the master, both trials would proceed as judge alone trial. A different mode of trial for the second hearing required an application pursuant to Rule 30(30), which was never made.

- [30] Under this analysis, it does not matter whether the order created two trials or two hearings of separate issues in one trial. The point rather is that if the judge or master directs that issues be tried and determined before others, the mode of trial must be the same as the original single trial absent further order [pursuant to] Rule 39(30). The very existence of that subrule presumes a default proceeding that both hearings will have the same mode of trial as the original joint trial, otherwise there would be no need for it.
- [32] A careful reading of *Beddow* reveals that it does not contradict this conclusion. In that case, an order was made for severance of liability and quantum, and liability was heard by a jury. Mr. Justice Thackray ended up discharging the jury and continued that first trial sitting alone. The question was then whether a jury could hear the second portion on quantum.
- [34] The finding that it was a single trial in *Beddow* was relevant because it determined whether Thackray J., having discharged the jury in the liability portion, was bound to continue hearing the second issue himself or whether the discharged jury could be reconstituted. Nowhere does that decision assert, nor can it be reasonably inferred from its reasoning, that if the original order had specified separate trials, a different mode could have been selected for the second one, subsequent to the ruling on severance and without a further judicial order.
- [35] It is noteworthy that notwithstanding the discretion conferred by Rule 39(30), Thackray J. cited authorities that describe as undesirable the very same splitting of modes of trial between liability and quantum that the defendant seeks in the present case.
- [36] In the same way, the careful attention to wording of the order by the master in *Fagervik*, following the authority of *Beddow*, providing for separate trials and the right to jury in the second one, does not support the proposition that there is a freestanding independent right of re-election of the mode of trial if such an order is not made. The important point is that they were made by a judicial official at the time of granting severance, not independently by one of the parties by later filing a jury notice.
- [34] In conclusion, Schultes J. stated:
- [37] It follows from all of this that while I have reached my conclusions by a different route than the master did, he was correct that there was no right to a jury trial in these circumstances and that the jury notice should have been struck.
- [35] While I do not find that the *Gill* case stands for the proposition that an application for different modes of trial must be made at the same time as the application for severance, I do find that it stands for the proposition that when no jury notice (such as in the case before me) had been served for a trial on all issues, that absent specific directions at the time of the severance order, both trials would proceed as judge alone. If a different mode of trial is sought for the second trial, an application is required as there is no freestanding right of a re-election of mode of trial by later filing a jury notice.

- [36] I also find that the authorities, in addition to Gill, do suggest that when issues are severed it is presumed that the same mode of trial should apply to both trials. There is the line of authorities that severance should not be ordered if the right to a jury trial is not waived by the parties.
- [37] Notwithstanding the above, I do find that the applicant is entitled to make this application. Therefore, I will consider its merits.
- [38] I have already reviewed the basis for the applicants seeking a jury trial on quantum. This is an application for a discretionary order, so my discretion must be made judicially and exercised in accordance with the accepted principles of law, rules and practice. At the time of the case planning conference before Justice Tindale, now two years ago, the plaintiff filed a case plan proposal anticipating a trial for 10 days on all issues and that it would be by judge alone.
- [39] In reliance upon the case plan proposal filed by the defendant Adams and the case plan proposal of the defendant Vora being silent on mode of trial, the plaintiff expected a judge-alone trial, which is indeed what occurred on the liability issue.
- [40] When they agreed to sever the issues, the parties agreed that the liability trial was judge alone. There is nothing within the case planning conference order that indicated there would be a different mode of trial on the issue of damages. It is only after the liability trial is completed that one of the defendants, not the defendant Adams, files a notice for a jury trial on the damages issue. Even after that notice was served and the parties are discussing whether they need longer than the 10 days reserved, the discussions still proceed on the basis that the mode would not be changed to a jury, as the communications between counsel were to the effect that if it is judge alone, they do not need 15 days as 13 days would be sufficient.
- [41] Again, relying on these representations from the defendant, the plaintiff agreed to adjourn the trial for another 10 months. This begs the question, would the plaintiff have agreed to the severance in the first place had she known a jury notice would be served after the liability trial proceeded by judge alone? That, to me, appears very unlikely.
- [42] Likewise, based on authorities referred to earlier, would the presiding judge at the case planning conference even make the order for severance, if it was known that a party was unwilling to give up the right to a jury trial at the assessment of damages stage?
- [43] In *Smiley v. Wolch* (1997), 45 B.C.L.R. (3d) 122 (S.C.), the defendant's application for severance after serving a jury notice was denied as the court determined it was an attempt by the defendant to gain an advantage by splitting the determination of liability and quantum of damages between either two different juries or between a judge and jury.

- [44] Furthermore, if this matter were to proceed with a jury, there will be significant prejudice to the plaintiff as she will have to wait an additional period of time if trial dates have to be reset. The expert evidence indicates that the plaintiff has a permanent partial vocational disability and, as she works in an administrative job requiring extensive typing, she has been reduced to part-time work.
- [45] Accordingly, in exercising my discretion, I am striking the applicants' jury notice and their application that the current trial on the issue of quantum of damages be heard by a jury is dismissed.
- [46] Are there any submissions on costs?
- [47] CNSL M. SIREN: It would be costs to the plaintiff, who was successful on the application.
- [48] CNSL T. MUELLER: Yeah, and for the defendants Nissan Canada Incorporated and Shivani Vora, our position would be costs should be in the cause.
- [49] THE COURT: Thank you both. Costs of this application will be in the cause.

"Krentz A.J."

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Prepared on 26 October 2026 · Esheria