

CANADA / JUDGMENT

# Adamson v. Charity

2006 BCSC 1642

## COURT

Supreme Court of British Columbia

## DECIDED

6 November 2006

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2006 BCSC 1642 Adamson v. Charity IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Adamson v. Charity, 2006 BCSC 1642 Date: 20061106 Docket: 02-1809 Registry: Victoria Between: Roger Adamson Plaintiff And Donald Emil Charity Defendant Before: The Honourable Mr. Justice Metzger Reasons for Judgment Counsel for the Plaintiff: D.A. Acheson, QC S. Sweeney Counsel for the Defendant: R.B. McDaniel Date and Place of Trial/Hearing: October 27, 2006 Victoria, B.C.

## BACKGROUND

- [1] This is an application by the plaintiff to strike the jury notice pursuant to Rule 39(27) of the Supreme Court Rules. The parties made their submissions in chambers on October 27, 2006.
- [2] The defendant contested the application for three reasons:
1. The application prejudiced the defendant because it was not brought in a timely manner;
  2. The application is based upon the opinion of plaintiff's counsel and is, consequently, self-serving; and 3, The issues do not require a scientific investigation nor are they intricate or complex.
- [3] I gave my decision to strike the jury notice at that time with reasons to follow.

## ANALYSIS

- [4] Rule 39(27) provides that an application to strike a jury notice must be made within seven days of its delivery. However, Rule 35(4)(a) states that at a pre-trial conference, a judge or master may order that a trial be heard without a jury. The authorities establish that the court is not constrained by the time restriction in Rule 39(27) particularly given Rule 35(4)(a). If it is necessary to ensure a fair trial, a court must have the opportunity to review the mode of trial at a later stage (see *Sadowick v. Doobay*, [1982] B.C.J. No. 447).

- [5] In this case, the defendant filed the jury notice on September 18, 2003 and served the plaintiff on September 22, 2003. The plaintiff amended the statement of claim on June 22, 2006. Discoveries were not completed until August 2006. The expert reports of Dr. Riar and Dr. Robinson were not served by the defendant until August 9, 2006 and October 12, 2006, respectively.
- [6] I agree with the plaintiff that in this case it was appropriate to wait until all the expert reports were exchanged before bringing the application to strike the jury notice. The plaintiff's case has become more complex over time as an increasing number of experts have provided contradictory opinions about the nature and extent of the plaintiff's injuries as well as the appropriate treatment for them.
- [7] Even if the application was not brought in a timely manner, I am unable to find that this has prejudiced the defendant. Defence counsel explained that he has prepared for a trial by jury and that a trial by judge requires different preparation. However, defence counsel was unable to provide me with any specific examples of how changing his preparation would prejudice the defendant. Defence counsel admitted that he would not need additional expert reports and would still attempt to simplify matters as much as possible if the trial proceeded before a judge alone.
- [8] It is appropriate for the plaintiff to rely on his counsel's affidavit that outlines the background of the case as well as the anticipated evidence. In this case, the plaintiff relied on Ms. Acheson's affidavit and Mr. Sweeney spoke to the application in Chambers.
- [9] Determining whether to strike a jury notice under Rule 39(27) involves a two-step analysis (see *Cochrane v. Insurance Corp. of British Columbia*, 2005 BCCA 399 at paras. 23-24). A judge must determine whether the issues require prolonged examination of documents, a scientific or local investigation or are of an intricate or complex character before exercising his or her discretion.
- [10] If the evidence supports a finding of either prolonged examination of documents or scientific investigation, a judge must consider whether the examination or investigation can be made conveniently with a jury. Convenience, in this context, means the ability for a jury to understand the evidence and retain such understanding throughout the entire trial (see *Wipfli (Guardian ad litem of) v. Britten*, [1982] 1 W.W.R. 709 at para. 26).
- [11] Liability, the nature and extent of the injuries, and damages are all in dispute. The plaintiff alleges that he sustained various injuries as a result of the motor vehicle accident including: brain injury, injury to the zygapophyseal joint, with trauma to the C2-3 and C3-4 facet interfaces in the neck resulting in persistent suboccipital myalgia-neuralgia syndrome, rotator cuff tendonitis, chronic pain syndrome and major depressive disorder. The defendant asserts that the plaintiff's primary physical injuries include neck and shoulder injuries.

- [12] The plaintiff claims that at the time of the injury, he was self-employed as a carpenter, property investor and property manager. The defendant claims that the plaintiff worked with his hands as a contractor who installed doors and kitchens and who provided handyman services to real estate properties owned by his wife.
- [13] The defence submits that the case is not complicated and the medical records in the two years following the motor vehicle accident are not complex, voluminous or overly scientific. The defence submits that if the case at hand is complex or intricate, it is because the plaintiff has made it so by retaining multiple experts to generate voluminous reports.
- [14] It is my opinion that this case requires a scientific investigation, prolonged examination of reports and is complex in character.
- [15] This case is complex as it involves an extensive scientific inquiry as well as an economic investigation. There are 21 experts who have provided 36 expert reports totalling approximately 500 pages. There are 220 medical and scientific terms within 33 medical expert reports, all of which would have to be explained to a jury so that the jurors could understand and evaluate the opinions offered. Understanding the medical reports will entail understanding the 118 scientific tests that have been administered to the plaintiff over the past six years. These tests are highly specialized, technical, and scientific. In addition, there are 2500 pages of clinical records and 15,600 pages of economic reports.
- [16] There are significant conflicts among the experts with regard to fundamental issues such as the nature and extent of the plaintiff's injuries. The scientific inquiry will involve conflicting evidence involving diagnosis, causation, mitigation, prognosis, and future care. A complicating factor will be the effects of the plaintiff's prescription medications.
- [17] In addition to the complexity arising from the scientific inquiry, the case is further complicated by the assessment of damages. The plaintiff claims pecuniary damages arising from loss of rental income, outside contracts, opportunity to invest in further rental properties, and extra labour costs. Given that all of the real estate is owned by the plaintiff's wife, there is an issue as to whether the plaintiff was a property investor and property manager. Accountants, economists and a real estate appraiser will all offer evidence with respect to the plaintiff's alleged pecuniary damages.
- [18] Given that I have found that the case is complex and requires prolonged examination of expert reports and a scientific investigation, I must determine whether the examination and investigation can be made conveniently with a jury.
- [19] It is estimated that between 40 and 50 witnesses will testify at trial. Of those witnesses, 22 will be experts. There are 14 different specialities among the medical experts. Given the conflicting expert opinions, the jury will need to understand each area of speciality and the training and qualifications of each specialist in order to determine which specialist is better qualified to offer an opinion.

- [20] The trial is scheduled for 21 days. It is unlikely that the jury will hear the evidence in an uninterrupted manner. Due to the plaintiff's medical condition, he is only able to testify in the afternoons for no more than two and a half hours. To accommodate various experts' schedules, lay witnesses may have to stand down and be slotted into the schedule where most convenient.
- [21] Given the complexity of the matters under investigation, the highly specialized nature of the evidence, and the likelihood that the evidence will not be presented in a continuous, narrative fashion, it is my opinion that a jury would have great difficulties understanding and maintaining that understanding throughout the trial. Furthermore, if the trial is not completed in the days assigned, then it would have to be finished after the Christmas break. It would be exceedingly difficulty for a jury to retain understanding of such highly complicated matters over the Christmas break. DECISION
- [22] In arriving at my decision, I rely on the words of the B.C Court of Appeal in MacPherson v. Czaban, 2002 BCCA 518 at para. 13: Our system of civil justice places considerable faith in the robust common sense of juries but Rule 39(27)(a) recognizes that there are limits. Some cases raise issues of controversial evidence that are too intricate or complex to be fairly tried by a jury.
- [23] This is such a case. Pursuant to Rule 39(27), I order that this case be tried by judge alone.  
"R.W. Metzger, J." The Honourable Mr. Justice R.W. Metzger

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Prepared on 27 October 2026 · Esheria