
CANADA / JUDGMENT

Allaire v. George

2020 BCSC 829

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

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2020 BCSC 829 Allaire v. George

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Allaire v. George,

2020 BCSC 829

Date: 20200305

Docket: M174166

Registry: Victoria

Between:

Ryan Allaire

Plaintiff

And:

Dustin George

Defendant

Before: The Honourable Mr. Justice Johnston

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Sweeney

Counsel for the Defendant:

S. Rowed

Place and Dates of Hearing:

Victoria, B.C.

March 3 and 5, 2020

Place and Date of Judgment:

Victoria, B.C.

March 5, 2020

- [1] THE COURT: I will reserve the right to edit these reasons if they are ordered. The result will not change and I do not do significant violence if I do edit.
- [2] The plaintiff applies under Rule 12-6(5) for an order that the defendant's jury notice be struck and the trial of this action proceed before a judge alone. In the alternative, the plaintiff asks that this application be adjourned to the trial judge for the first day of trial. That is in the notice of application. It was not pursued in argument before me and, in my view, this is an issue that ought to be decided now.
- [3] The trial is scheduled to begin March 23, 2020. It is estimated to require ten days. The underlying action seeks damages for injuries said to have been caused by negligent driving on the part of the defendant on March 7, 2016. I understand that liability for the accident has been admitted.
- [4] The action was commenced on November 7, 2017, a notice of trial issued September 11, 2018, and the defendant delivered his notice requiring trial by jury on September 14, 2018. This application was first brought January 23, 2020, and that was long after the seven days following delivery of the jury notice required for notices to strike under Rule 12-6(5). Notwithstanding that, the defendant does not object to the timing of this application.
- [5] Other relevant portions of Rule 12-6(5) are:
- (5) . . . a party on whom a notice under subrule (3) has been served may apply
- (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
- (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
- (ii) the issues are of [such] an intricate or complex character, or
- (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action . . .

- [6] The plaintiff has argued this application on the first two of those three grounds. The third is not an issue here.
- [7] In his notice of civil claim, the plaintiff pleads that the defendant's negligence caused him injuries to his neck, back, shoulders, left arm, hand, and fingers, pain in his left ear, headaches, and sleep dysfunction. He alleges that in addition to the pain and suffering consequent on his injuries, they have caused him to lose income, have impaired his earning capacity, and will put him to cost and expense for future care.
- [8] In an amended response to civil claim, the defendant admits he breached the duty of care he owed to the plaintiff, but denies that the plaintiff has suffered the injuries claimed. The defendant denies that his negligence has caused the losses claimed and pleads that they arise from pre-existing conditions or injuries, from intervening conditions or injuries, or from congenital defects.
- [9] I understand that the plaintiff is an electrician. He has a medical history of knee problems that required surgeries before the accident, and these knee problems led to an assignment of permanent partial disability and an award for permanent partial disability from WorkSafeBC or the Workers' Compensation Board. This all happened before the accident.
- [10] The plaintiff's knees were not injured in the accident, but the impact, if any, of his pre-existing knee problems on his earning capacity and/or his future needs if the accident had not occurred is very much in issue.
- [11] The plaintiff also had degenerative disc disease in his neck before the accident for which he had consulted a neurologist. The plaintiff has had medical imaging tests showing the degeneration and some of these occurred eight or nine years before the accident.
- [12] Additionally, the plaintiff fell in 2018, that is after the accident, and as a result of that fall, he suffered some injuries to his neck. He also had symptoms in his arm following the fall. It is in issue whether the injuries suffered in this fall contribute to the plaintiff's present condition or complaints.
- [13] This case, not surprisingly, has a medical controversy. For the plaintiff, Dr. Filbey, a specialist in physical medicine and rehabilitation, has opined that the plaintiff's neck symptoms were not likely to have impaired him until his sixth decade if the accident had not occurred. For the defendant, Dr. Thompson, an orthopedic specialist, has given an opinion that if there had been no accident, the plaintiff's degenerative neck condition would have interfered with his employment in any event. The two experts disagree over just about everything, including whether or not or when any pre-existing condition, particularly the neck degeneration, might have become disabling to the plaintiff or might have affected his earnings if the accident had not occurred.

- [14] The parties in this case have provided notice that they intend to rely on the opinions of five experts in all. These are set out in eight reports totalling some 160 pages. The experts include the medical doctors I have referred to, as well as vocational and functional capacity experts and rehabilitation experts.
- [15] The plaintiff says that he has a file with WorkSafeBC, as it now is called, and that this file amounts to about 1,700 pages. He says, as well, there are clinical records from doctors and other treatment providers who have provided opinions in this case and that they amount to about 200 pages. The plaintiff says that there are a further 150 pages of what he calls economic records.
- [16] I start an analysis by reminding myself that there is a strong presumption in favour of allowing a party to have his or her trial with a jury. The parties to this application accept that the onus is on the plaintiff to show that the defendant should be denied his trial by jury and that this burden is not easily discharged.
- [17] Rule 12-6(5) sets up factors that are to be considered for grounds upon which a jury notice may be struck. These start with subparagraph (i), that is that the issues require prolonged examination of documents or accounts, or a scientific or local investigation that cannot be made conveniently with a jury. There are two questions here: first, whether issues will require prolonged examination of documents; second, whether issues will require scientific or local investigation.
- [18] The parties before me agree that the medical evidence to be tendered by each of them constitutes a scientific investigation that will have to be conducted in this case. They disagree whether the issues in this case will require prolonged examination of documents. Whether or not this is the case is a question of fact. The other criteria or ground or part of that ground is whether, if prolonged examination of documents is found as a fact, or indeed the scientific inquiry already conceded, cannot be made conveniently with a jury. That involves whether a trial can properly be conducted with a jury, whether the jury will be able to understand the evidence, grasp the issues being litigated, be able to retain the evidence over the course of the trial, so as to be able to fairly consider it all when it comes time to deliberate.
- [19] Turning to whether there is or will be required a prolonged examination of documents, the plaintiff argues that there are a very large number of documents that will necessarily be presented in this case. He points to his 1700-odd-page WorkSafe file, he points to the clinical records of doctors and other treatment providers he has consulted, both before and after his accident. The plaintiff points to the fact that the defendant has given notice that he intends to tender in evidence as business records the clinical records of a number of doctors who examined him and treated him before the accident. The plaintiff says that the documents in this case, including his WorkSafe file, and the clinical records, when combined, occupy over eight three-ring binders.

- [20] Defence says that the fact that these documents exist is not particularly important. The defence says that the fact that they gave notice of an intent to tender as business records documents listed by them is not necessarily an indication that the defendant intends to bury the jury in documents in this case. Defence says that all they intend to do or it intends to do is to employ these documents, or some of them, as either aides-mémoire to refresh the memory of a witness or to cross-examine, particularly the plaintiff, or perhaps cross-examine those experts called by the plaintiff during the trial.
- [21] To some extent, submissions on this ground based upon the sheer volume of available paper is an in terrorem argument. It is based on either fear or prediction as to what a party, in this case the defendant principally, will attempt to do with the available documents, and I include here photographic evidence or medical imaging, either images themselves or the reports on them.
- [22] I point out that the trial judge has a gatekeeper function. That function is to ensure that only relevant and admissible evidence is put before a jury. During the course of submissions, plaintiff's counsel indicated, by holding his fingers apart, that the documents he intends to tender are not voluminous. Defence counsel did the same.
- [23] I am not persuaded that the fact that there are perhaps a thousand to 2,000 pages or thereabouts of paper available to the parties in this case means that this jury, if it continues, will be required to engage in a prolonged examination of those documents.
- [24] The case has not been made before me that such a prolonged examination is either necessary to either party or advisable to either party, and again I point out that part of the function of the trial judge is to control, at least to some extent, the unnecessary dumping of paper into the record, and that occurs whether it is a judge-alone or a jury trial.
- [25] So I find as a fact that there will not necessarily be a prolonged examination of documents in this case.
- [26] The plaintiff also argues that the documents involved, or at least some of them, are scientific in nature. Many of them contain medical terminology that will not be readily understandable by the jury, and that this medical terminology will require laborious and confusing translation to make it understandable. The plaintiff says the jury is going to have a hard time retaining the numerous translations that will be required and have a harder time making sense of them during their deliberations.
- [27] This I think is an additional factor over and above the concession that the issues in this case will require scientific investigation. The question is whether the plaintiff has established that the scientific investigation, as complicated by the arcane medical terminology in many of these documents, make this a case that cannot conveniently be tried by a jury.
- [28] I have read the reports of Dr. Filbey and Dr. Thompson that counsel dwelled upon during their submissions. Those reports contain the usual or the expected medical terminology. As an aside, while the use of medical terminology devils lawyers, devils judges, and devils

juries, physicians cannot be criticized unduly for their use of medical terminology. I gather that the use of medical terminology is considered to be scientifically necessary, and that is that doctors require precision and clarity when communicating with each other, and that precision and clarity is something that they consider they achieve through the use of their somewhat arcane terminology.

- [29] I recognize that this terminology is not part of the usual lexicon or vocabulary of non-medical people, but it is part of the job of counsel to ease the process, both for the jury or for a trial judge sitting alone, by having the terminology interpreted, translated if you like, one would hope before trial in the form of a glossary or otherwise, but at minimum during the trial.
- [30] It is also the function of counsel to remind the jury during closing argument of the translations extracted in the evidence, so that the jury is not necessarily, if counsel are doing their job, going to be taxed with remembering a translation or definition given days or weeks earlier.
- [31] The plaintiff says that raw data in the form of medical imaging from things like computerized tomography scans, magnetic resonance imaging tests, and the reports of the radiologist that accompany them will likely be produced at trial, that this compounds the scientific investigation required, and that it cannot conveniently be made with a jury. As I understand it, the use of these films or images will occur, if at all, in cross-examination of medical experts. That these images will or may be shown to an expert in cross-examination does not necessarily mean that they will be tendered in evidence, nor does it necessarily mean that, if tendered, they will be admitted into evidence if there is an objection to their admissibility. Otherwise, the respective experts' testimony about images or reports will not likely be much different than it would be in any other case tried without a jury.
- [32] Part of this argument or this branch of the argument centres on the plaintiff's theory that doctors who have advanced opinions in the past, opinions that are contained in their clinical records or consultation reports that form part of other doctors' clinical records, but who are not produced as experts in the trial and whose opinions have not been subject to notice of an intention to rely on them as part of the trial are going to be snuck through the back door in this trial through cross-examination or otherwise, and that no amount of judicial instruction will prevent the jury from using improperly or using at all material, including opinions that are not properly before the jury as opinions.
- [33] Part of the fear here of plaintiff's counsel is that even the clearest of instructions from a trial judge as to the use to which clinical records or consultation records can be put may not be understood by the jury, may not be recalled by the jury when they go to deliberate, or putting it at its worst, I suppose, may be completely ignored by the jury.

- [34] There is a great deal of speculation behind this argument, speculation that I am not prepared to accept as well founded, nor do I accept that there is any real possibility that a jury is going to ignore or not obey the instructions of the trial judge. At the outset of a trial and from time to time during a trial, juries are reminded of the different roles of the participants in the trial process, including that they are to take the law from the judge. I am satisfied that juries will and do what they are told by the trial judge.
- [35] Finally, I note that under Rule 12-6, a judge always has the power to discharge a jury and to continue a trial without a jury, if the judge is satisfied that a party or a party's counsel has misconducted themselves. The expectation raised by that rule, which I think is subrule (11) or (12), is that conduct short of misconduct can be adequately dealt with through instructions from the presiding judge.
- [36] Reference was made during argument to the probability that there will be numerous objections to the admissibility of evidence throughout the trial, and this is going to require the jury to be in and out of the courtroom while those objections are argued. I have not been shown that this goes beyond speculation, perhaps expectation. It may well have some reasonable ground or basis for it but, in short, there is nothing new in that, and I have not been satisfied that there is anything here in the nature of the scientific inquiry that elevates this case to one which cannot conveniently be tried with a jury.
- [37] The next factor is whether the issues are of an intricate or complex character, and here the argument is that the existence of the plaintiff's pre-existing degenerative condition creates an issue whether that condition should be treated as a thin-skull condition or a crumbling-skull condition. Whether the pre-existing condition, and I am referring principally to the neck degeneration here, was symptomatic or asymptomatic at the time of the accident or for a period of time before the accident to take it from one category to the other are questions of fact to be decided on the evidence and, in my view, not beyond the capability of a properly-instructed jury.
- [38] Similarly, a properly-instructed jury is entirely capable of deciding questions of causation in cases of injuries involving people with pre-existing conditions. It may be that untangling questions of causation is not the simplest task in the world, but it is a task that, in my view, a jury properly instructed is as capable of performing as is a trial judge. Similarly, a properly instructed jury is capable of considering and deciding whether injuries or a combination of injuries are divisible or indivisible.
- [39] These are all matters that are subject to instructions, including draft or form instructions found in CIVJI. They are all capable of being modified as required by the trial judge to reflect the actual circumstances of the case, and they are all matters upon which counsel will have input to the charge to be delivered by the trial judge.
- [40] The impact, if any, of the plaintiff's pre-existing knee conditions, their possible effect on his earning capacity if there had been no accidents are all questions of fact and they are of a type that often arise in cases of this sort and that juries routinely deal with as part of their

task as the triers of fact. The same holds true for the impact, if any, on the plaintiff's claims of his fall in 2018 and any injuries he suffered as a result. I also consider whether the nature and extent of the possible scientific inquiry already referred to adds to the complexity of the issues in this case so as to warrant proceeding without a jury. In my view, any additional complexity arising from the conjures of issues does not warrant striking the jury notice.

- [41] In sum, this is not expected to be a long trial, 10 days is relatively short. There are not a large number of experts to be called. The volume of expert opinion is not substantial. The opinions to be tendered are relatively straightforward, notwithstanding the controversy between Drs. Filbey and Thompson. The jury will be asked to answer questions that are not so complex or arcane as to be beyond its ability with the assistance of counsel and the instructions of the judge. The number and nature of the issues to be canvassed are not out of the ordinary for cases of this sort.
- [42] So the matters raised by counsel for the plaintiff in this application do not, either separately or when considered together, militate against this trial being heard by a jury. There is simply not enough to deprive the defendant of his right to a jury trial. The application is dismissed. Costs will be in the cause.

"The Honourable Mr. Justice Johnston"

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