
CANADA / JUDGMENT

Chapman-Fluker v. Gustavson

2019 BCSC 1022

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1022 Chapman-Fluker v. Gustavson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chapman-Fluker v. Gustavson,

2019 BCSC 1022

Date: 20190624

Docket: M176874

Registry: Vancouver

Between:

Amy Chapman-Fluker

Plaintiff

And

Michael Gustavson, Brigitte Bureau-Peterson

and Toyota Credit Canada Inc.

Defendants

Before: Master Elwood

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

M.A. Huot

Counsel for the Defendants:

L.A.J. Dunn, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

April 25, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 24, 2019

INTRODUCTION

- [1] The defendants apply in this motor vehicle action to extend the time to file a notice requiring trial by jury beyond the deadline of 21 days following service of the notice of trial set by Rule 12-6(3) of the Supreme Court Civil Rules.
- [2] The defendants rely on Rule 22-4(2), which authorizes the court to extend or shorten any period of time provided for in the Rules. They say that the intention of the Insurance Corporation of British Columbia ("ICBC"), which has conduct of their defence, was clear from the outset that this case should be tried by judge and jury, and the reason why a jury notice was not filed was inadvertence by previous litigation counsel. The defendants submit they should be granted an extension because they applied without unreasonable delay once ICBC was notified of this error by its current litigation counsel, and because the plaintiff has failed to prove any resulting prejudice.
- [3] The plaintiff opposes the application. She says that, while a client may be relieved of the consequences of inadvertence by a solicitor, that relief should be granted sparingly where, as here, the instructing client is sophisticated and knowledgeable of the Rules, and the solicitor who failed to file the notice is its in-house counsel. In these circumstances, the plaintiff submits, the party desiring a trial by jury must move with all reasonable dispatch to seek an extension, and the extension should only be granted where it would be of little or no prejudice to the opposing party.

BACKGROUND

- [4] This action arises out of a motor vehicle collision on January 5, 2016. The plaintiff was merging into traffic on the Burrard Street Bridge when she was struck from behind by a vehicle driven by the first defendant and leased by the second defendant from the third defendant. The notice of civil claim was filed on August 15, 2017.

- [5] ICBC is the third party insurer of the defendants. Legal defence of the plaintiff's claim was assigned by ICBC to its in-house litigation department. Mark Gibson, an experienced lawyer in the litigation department, was appointed to act for the defendants.
- [6] The first ICBC examiner on the file was Liam Miller. Mr. Miller deposes that, upon reviewing the notice of civil claim, he formed the opinion that the mode of trial should be trial by jury. On September 1, 2017, Mr. Miller provided instructions to the litigation department which included that mode of trial.
- [7] On November 14, 2017, Mr. Gibson informed Mr. Miller of his assignment and requested a copy of Mr. Miller's file. Mr. Gibson's note to Mr. Miller included the following:

We also confirm at this time your instructions to have this matter heard by a jury and will attend to filing the jury notice upon receipt of the Notice of Trial.

- [8] Mr. Gibson subsequently discussed trial dates and estimates for the length of the trial with plaintiff's counsel. Mr. Gibson did not raise ICBC's intent to have the case tried by a jury during these discussions.
- [9] On February 6, 2018, plaintiff's counsel filed a notice of trial, setting the trial for August 26, 2019, for eight days. On March 1, 2018, plaintiff's counsel delivered the filed notice of trial to Mr. Gibson. This began the running of the 21 days under Rule 12-6(3) for the defendants to file and deliver a jury notice.
- [10] On March 5, Mr. Miller transferred to a position in a different department in ICBC, and Mr. Miller's manager, Ray Sandrin, assumed conduct of the file until a replacement examiner could be assigned.
- [11] On March 22, the last day for a jury notice under Rule 12-6(3), Mr. Gibson forwarded a copy of the notice of trial to Mr. Sandrin without any mention of the mode of trial. In a responding e-mail shortly after noon that same day, Mr. Sandrin wrote to Mr. Gibson:

The prior examiner, Liam Miller has moved departments, so while we await his replacement, I have his CC files in my name. I am not sure if you had a chance to discuss this file with Liam, but this was a very minor r/e impact, the injuries and cognitive complaints being alleged appear out of character for this kind of claim, as a result, I would like to preserve our right for a jury. I thought initially this was to be set for 10 days, but the trial notice says only 8. With the anticipation this may proceed with a jury, could we please ensure sufficient days are set (I was thinking based on the reports we expect we may need 12-15 days). (emphasis added)

- [12] Mr. Gibson did not file a jury notice. He deposes in an affidavit that:

Despite having every intention of ensuring that the Notice Requiring Trial by Jury (the "Jury Notice") was filed within the time period required by the Supreme Court Rules, and having previously confirmed my instructions to do so in my letter to Liam Miller dated November 14, 2017, and receiving corroborative instructions from Ray Sandrin in his e-mail dated March 22, 2018, I failed to ensure that the Jury Notice was filed in the time prescribed by the Supreme Court Rules, or at all. The reason for my failure to file the Jury Notice was through my inadvertence.

[13] Mr. Sandrin deposes that, during the time the file was in his name, it was his intention that the matter be tried by a jury and his understanding that Mr. Gibson had taken the necessary steps to preserve the right to a trial by jury.

[14] On July 18, 2018, the file was re-assigned to an examiner named Brooke Valle. Ms. Valle first reviewed the file on or about September 17, 2018, in contemplation of a meeting with Mr. Gibson scheduled for September 20. Ms. Valle deposes that, upon her review:

I noticed that the instructions with respect to this file were to have the matter heard by a judge and jury at trial. Despite this, I noticed that there was no Notice Requiring Trial by Jury within the file. I intended to bring this up with Mark Gibson at our scheduled meeting on September 20, 2018, as my understanding at that point was that the right to a jury trial had been preserved. (emphasis added)

[15] An ICBC manager prepared a memorandum about the case in preparation for the meeting on September 20. One of the items the manager noted for discussion with the legal team was: "Determine what our mode of trial is - Jury trial should be preferred".

[16] The meeting on September 20 did not take place because Mr. Gibson forgot about the appointment. The meeting was rescheduled for September 27. On September 26, Mr. Gibson informed Ms. Valle that new defence counsel was going to be assigned to the file. Ms. Valle decided to wait and discuss the file with the new counsel. She did not confirm with Mr. Gibson whether a jury notice had been filed.

[17] On November 2, 2018, ICBC delivered the pleadings to the defendants' current counsel, Lorne Dunn, Q.C., with confirmation of his retainer for an eight day trial starting August 26, 2019, and a note that further instructions would come from Ms. Valle, to whom the letter was copied.

[18] On November 13 and again on November 20, Mr. Dunn noted in e-mail correspondence with Ms. Valle that he had yet to receive file materials from the ICBC litigation department, and asked her to follow up.

[19] On November 30, Mr. Dunn received the file materials from Mr. Gibson. On December 3, he advised Ms. Valle that there was no jury notice in the file.

[20] The defendants filed and delivered this application on January 25, 2019. According to plaintiff's counsel, this was the first time the plaintiff learned of any intention by the defendants that the case be tried by a jury.

- [221] The application was initially returnable on February 11, 2019. By cross-application, the plaintiff sought production of the full ICBC file. The parties agreed to partial production relating to the issues on the application based on the decision in *Weir-Jones v. Taylor*, 2013 BCSC 1633. It took some time for counsel to settle the wording of a consent order, for ICBC to produce the requested documents and to resolve some disagreements over redactions in the disclosure. The application was adjourned generally while these steps occurred.
- [222] The application was re-set for April 12, 2019; however, there was insufficient court time on that day for it to be heard. The application was eventually argued on April 25, 2019.
- [23] Meanwhile, on February 28, 2019, plaintiff's counsel commenced an examination for discovery of the defendant driver. The discovery was adjourned generally without being completed. No other examinations for discovery had taken place as of the date the application was heard.
- [24] The plaintiff obtained three expert reports for possible use at trial. The plaintiff also agreed to attend three independent medical examinations. The parties had not delivered any expert reports as of when the application was heard; they will have done so since the hearing, because the deadline for expert reports was May 31, 2019.
- [25] As stated, the trial is set for eight days starting August 26, 2019.

Extension of Time to File a Jury Notice

- [26] Rule 12-6(3) requires two steps to obtain a jury trial: a party must first preserve the right to a trial by jury by filing and delivering the jury notice within 21 days after service of the notice of trial; the party which issued the jury notice must then secure or perfect that right by paying the required fees at least 45 days before trial.
- [27] Prior to 1998, the Rules required litigants to pay the jury fees at the time of delivering the jury notice. In a leading authority decided under the previous Rule, *Hoare v. Firestone* (1989), 42 B.C.L.R. (2d) 237 (C.A.), the Court of Appeal explained the importance of electing trial by jury at an early stage in the proceedings, at page 241:

The learned judge very properly emphasized the importance of the right to elect for jury trial. But on a broad consideration of the rules and authorities which has been possible in these appeal proceedings I have concluded that the election is intended to be made once only, at a particular stage, and for good reason. If the trial may be before judge and jury, rather than judge alone, that is generally an important consideration for both parties in preparation of the case and perhaps, indeed, in the selection of counsel. It is, I think, for these reasons that the rules require the election to be made, once for all, soon after the action is set down, instead of leaving the parties free to elect thereafter on the basis of later developments.

- [28] In *Gill v. Mijatovic*, 2016 BCSC 239, Mr. Justice Davies found that these considerations remain important to the court's determination whether to extend the time for filing a jury notice, recognizing, however, that a party who files a jury notice may now unilaterally "opt out" of a jury trial by not paying the jury fees.
- [29] Mr. Justice Davies extracted from the authorities before and after the rule change the following non-exhaustive list of the factors to be considered on an application to extend the time for filing a jury notice, at paragraph 45(3) of *Gill*:
- (a) Whether the party applying had a clear intention or desire to have the action tried by a jury during the time allowed for filing a Jury Notice and whether the failure to do so was due to inadvertence or neglect on the part of the applicant or their solicitor. In that regard:
 - (i) Evidence of intention, inadvertence or neglect must be established by the clearest and best evidence. See: *Litt v. Grewall*, 2011 BCSC 1071 (at para. 22);
 - (ii) Generally speaking, the evidence required will be that of the solicitor and the client, however, in some circumstances the evidence of the solicitor alone may be sufficient. See: *Narang v. Bhatthal*, 2006 BCSC 513 (at para. 28) and *Moll v. Parmar*, 2012 BCSC 1373 (at paras. 23-26 and 36); and
 - (iii) The affidavit of a paralegal alone or evidence comprised of double hearsay will not suffice. See: *Ngai v. Cho et al*, 2001 BCSC 333 (at paras. 23-25 and 31) [*Ngai*];
 - (b) Whether the character of the action has so materially or fundamentally changed that it is now clearly appropriate for a jury trial when it was clearly not during the time allowed for the filing of a Jury Notice. See: *Hoare*; *Coulson v. Syra*, 2001 BCSC 914; *Penner v. Great-West Life Assurance Co.*, 2002 BCSC 1131,; and *Robertson v. Canadian Imperial Bank of Commerce* (1994), 1994 CanLII 1752 (BC CA), 99 B.C.L.R. (2d) 246 (C.A.) [*Robertson*];
 - (c) Whether the parties have consented to the late filing. See: *Coulson and Penner*;
 - (d) Whether the party opposing the extension of time to file and serve a Jury Notice can point to any prejudice that would arise if an extension of time is allowed. See: *Moll*; *Penner*; and *On*; and
 - (e) Whether the application to extend the time for the filing of a Jury Notice has been brought in a timely manner. See: *Coulson*; *Penner*; *Ngai* (at para. 25); *Robertson* (at paras. 33 to 35 and 50); and *Donovan v. Vat*, 1996 CanLII 8519 (B.C.S.C.) [*Donovan*] (at paras. 24 and 26).
- [30] Of these factors, the following considerations appear to me to be relevant on the current application:
- a) Whether the defendants had a clear intention to have the action tried by a jury during the time allowed for filing a jury notice, and whether the failure to do so was due to inadvertence or neglect on their part or on the part of their solicitor;

- b) Whether the plaintiff has demonstrated prejudice that would arise if an extension of time is allowed; and
- c) Whether the defendants brought this application in a timely manner.

ANALYSIS

- [31] I think it is important to keep in mind the reality that the defendants are only nominal parties in this case. The real contest is between the plaintiff and ICBC, and Mr. Gibson's real "client" was his employer, ICBC. I will therefore refer to ICBC as the applicant for an extension of time, and consider the equities between the parties from that perspective: see *Sutherland v. McLeod*, 2004 BCCA 653.
- (a) Intention to Have the Case Tried by Jury
- [32] The evidence establishes that ICBC formed an intention early in the case to have the matter tried by a jury, and that its intention to require a trial by jury existed during the time period for a jury notice under Rule 12-6(3).
- [33] Mr. Miller formed the opinion that the case should be tried by a jury on his initial review of the notice of civil claim. He incorporated those instructions in his initial communication to the litigation department. Mr. Sandrin confirmed the instructions within the time limit under Rule 12-6(3), on the last day, with sufficient time remaining in the day for Mr. Gibson to have filed and delivered the jury notice on time.
- [34] Subject to a finding of prejudice to an opposing party, the courts will generally relieve a litigant from the consequences of an inadvertent failure by counsel to file a jury notice in time, even where there were multiple failures: *Smith v. Vancouver General Hospital* (1981), 28 B.C.L.R. 282 (C.A.), at page 287; *Oberreiter v. Akmal*, 2008 BCSC 1300, at para. 10.
- [35] The court is not bound, however, to accept ICBC's assertion that the deadline was missed solely through the inadvertence of counsel: *Loring v. Insurance Corporation of British Columbia*, 1996 BCSC 1386.
- [36] ICBC adjusters are familiar with the procedural rules that govern the right to elect a trial by jury. Mr. Miller and Mr. Sandrin both demonstrated an understanding of those rules in this case, yet there is no evidence that either followed up to confirm that a jury notice had in fact been filed. Moreover, counsel at the relevant time was an employee of ICBC's own litigation department, making it difficult, in my view, for ICBC as the interested party to separate itself from counsel's failure to file the jury notice.
- [37] Mr. Sandrin's e-mail on the last day establishes ICBC's intent to preserve the right to a jury trial within the time limit; however, in my view, the failure to file the required notice in time is one that should be attributed to ICBC as the applicant for an extension, and not simply the inadvertence of counsel.

(b) Whether the Plaintiff Has Demonstrated Prejudice

[38] ICBC submits that the plaintiff has failed to discharge its onus of demonstrating prejudice that will arise if the time limit for a jury notice is extended. ICBC notes that there is no affidavit from the plaintiff herself, and that the only evidence filed in opposition to the application was an affidavit by a paralegal.

[39] The plaintiff relies on three categories of prejudice.

[40] First, the plaintiff says she prepared for trial on the basis it was to be a trial by judge alone. She submits that prejudice should be inferred, without the need for specific proof, from a change in the mode of trial at this late stage in the proceeding.

[41] As the Court of Appeal observed in *Hoare*, the mode of trial is an important consideration for both parties "in preparation of the case, and perhaps, indeed, in the selection of counsel". Mr. Justice McEwan echoed these comments in *Pearson v. Community Connections Society*, 2013 BCSC 952, finding that litigants are entitled to order their preparation on the assumption that the mode of trial will not change. Mr. Justice McEwan further held at paragraphs 25 and 27:

[25] Counsel for the defendant in the present case has submitted that choices of witnesses to be called, particularly experts, and the manner in which the evidence will be presented may vary depending on the mode of trial. It can be prejudicial to the party not selecting a jury to proceed on that expectation, and to subsequently have the premises of the litigation change.

[27] [T]he jury notice here comes at a very late stage in the proceedings, with a trial of a matter a few months away. I do not think that in such circumstances, the burden falls on the defendant to show actual prejudice. To require that at this point would, almost inevitably, amount to a requirement [to] disclose matters of strategy or judgment that are not the business of the other party or of the court. Prejudice may be inferred. (emphasis added)

[42] ICBC seeks to distinguish *Pearson* on the basis the jury notice in that case was filed just four months before trial, whereas in this case ICBC delivered its application for an extension of time to file a jury notice on January 25, 2019, which was eight months before the scheduled trial date.

[43] While the application was delivered in January, it was not heard until April 25, 2019. The delay in having the application heard cannot be attributed to the fault of either party; however, the fact remains, as a result of ICBC's failure to file a jury notice, there will be no resolution of the mode of trial until these reasons are issued, approximately two months before trial.

- [44] The selection of a jury trial is meant to be made early in the litigation process so as to allow the parties to prepare for trial. This purpose of the deadline remains an important consideration following the change in the Rules. Although a party who has delivered a jury notice in time may opt out of a jury trial by not paying the jury fees, a party not receiving a jury notice is still entitled to rely on its absence to assume, following the expiry of the deadline, that the case will not be a jury trial.
- [45] The only specific example the plaintiff provides of a difference in her preparation is that she selected and instructed her experts on the basis the matter will be a judge alone trial. This is deposed to by Ms. McBride in her first affidavit. As counsel for ICBC points out, however, the first two expert reports are identified in the plaintiff's list of privileged documents as having been created in 2016 and 2017, which were before the deadline for a jury notice on March 22, 2018. Ms. McBride clarifies in a second affidavit that the third of three expert reports was created after March 22, 2018.
- [46] In the circumstances, I will infer a degree of the prejudice referred to in Hoare and Pearson, recognizing that some of the plaintiff's preparation occurred before the deadline for a jury notice. More importantly, I find that it would be prejudicial to the plaintiff to have the mode of trial changed two months before the scheduled trial date.
- [47] Second, the plaintiff submits that the eight days booked for the trial will be insufficient time for a jury trial. She argues that an extension of time to allow ICBC to file a jury notice will result in an adjournment of the trial.
- [48] There is no disputing that jury trials involve a number of additional steps and procedures and are therefore inherently longer than trials by judge alone. However, this factor has not always convinced the courts to deny an extension of time to file a jury notice. In Moll (one of the cases cited in Mr. Justice Davies' summary in Gill), Mr. Justice Abrioux held, at paragraph 37:
- [37] Additionally, the defendant has not pointed to any prejudice except the four week reserved may not be sufficient. I agree some additional time may be required, but that is not a factor of and by itself which militates against the exercising of my discretion in the plaintiff's favour.
- [49] Likewise, in On v. Venittelli, 2006 BCSC 1987, Madam Justice Bennet said, at paragraph 31:
- [31] With respect to the time estimate, neither counsel really know how long the trial will take. Counsel should work together in order to ensure that the two weeks time set aside is sufficient for the conclusion of the trial.

- [50] In the present case, I find it more difficult to discount counsel's concern that eight days will be insufficient for a jury trial. We are now closer to trial than the applications in *Moll and On*, at a time when counsel know their cases better. Liability is denied, which likely means the defendant driver will testify and the plaintiff will be cross-examined about the accident. The parties will likely tender at least three expert reports each. In my view, eight days is a reasonable estimate for a trial without a jury, but unrealistic for a jury trial.
- [51] Moreover, the evidence is that ICBC itself considered eight days insufficient for a jury trial. In his e-mail to Mr. Gibson on March 22, 2018, Mr. Sandrin said he thought the trial was to be set for 10 days and, based on his review of the reports, might require as long as 12 to 15 days as a jury trial.
- [52] I find that, unless the parties are able to add two days to the existing trial dates, the trial will need to be adjourned if it is to be a jury trial.
- [53] Third, the plaintiff says that jury trials are more expensive and require higher disbursements than trials by judge alone. Given that liability is denied, the plaintiff submits that she would bear the risk of these higher expenses at the end of the case if it is tried by a jury.
- [54] Again, there is no disputing that jury trials are more expensive. However, in my view, any prejudice to the plaintiff as a result of a more expensive mode of trial would be the result of the jury process itself, as opposed to ICBC's failure to file a jury notice within the time limit. If the added expense of a jury trial was relevant, it would militate against extending the time for a jury notice in every case. Accordingly, I consider it a neutral factor in my analysis.
- (c) Whether the Defendants Brought This Application in a Timely Manner
- [55] ICBC acknowledges, on the authority of the Court of Appeal decision in *Robertson*, at paragraphs 35 and 50, that it was incumbent on the insurer to move with "due dispatch" following notice that a jury notice had not been filed and apply for an extension of time.
- [56] In *Gill*, the date of notice for this purpose was the date on which opposing counsel put the applicant on notice of their position that a late filed jury notice was a nullity (see paragraphs 28 and 57(6)).
- [57] ICBC submits that notice in this case should be the date on which ICBC's current litigation counsel advised Ms. Valle there was no jury notice in the file, December 3, 2018, following which ICBC says it moved with due dispatch to apply for an extension. If relevant, ICBC argues, any delay prior to December 3, 2018, is explained by the adjusters' reliance on previous litigation counsel.
- [58] In my view, the existence of a jury notice in the file is not a matter on which the ICBC adjusters required legal advice or on which they were justified in waiting for new defence counsel to be appointed before taking steps to preserve the right to a jury trial.

- [59] The possibility that the case had been set for trial by judge alone and required follow-up to ensure it could still be a jury trial was flagged by Mr. Sandrin in his e-mail of March 22, 2018.
- [60] The file was transferred to Ms. Valle on July 18, 2018, but she did not review the file until September 17, 2018. The only explanation for this delay is that Ms. Valle was assigned approximately 140 other files at the same time she assumed a new position within ICBC.
- [61] When Ms. Valle finally reviewed the file on September 17, she noticed the absence of a jury notice. There is no evidence that she brought this fact to the attention of Mr. Gibson or anyone else. Ms. Valle's explanation for this is that the meeting with Mr. Gibson at which she anticipated raising the issue was cancelled and prior to the date of a rescheduled meeting she was informed the file was to be assigned to new counsel. Ms. Valle chose not to bring the issue forward, even while it took several months for ICBC to appoint new counsel. And there is no evidence Ms. Valle brought the issue to Mr. Dunn's attention, even after he was appointed on November 2, 2018.
- [62] It was not until after Mr. Dunn finally received the complete file from ICBC on November 30, 2018, and conducted his own review of the file, that ICBC took any action toward an application to extend the time to file a jury notice. Even then, the application was not delivered to plaintiff's counsel until January 25, 2019.
- [63] I find that ICBC had notice no later than September 17, 2018, of a real possibility that its litigation department had failed to file the necessary jury notice, and should have been aware of the issue several months before that date.
- [64] ICBC's explanation for the delay may be understandable in terms of the individual workloads of its adjusters and corporate decisions to reassign resources. However, that explanation is less than compelling as a reason between the parties in on-going litigation to forgive ICBC's failure to move with due dispatch after September 17, 2018, to clarify the status of the jury notice and apply for an extension.

CONCLUSION

- [65] This is not a case in which a client's intention within the time limit to have the case tried by a jury was simply frustrated by the inadvertence of counsel. In this case, ICBC, in both its claims adjustment and litigation departments, failed to ensure that a jury notice was filed in time and failed to move with due dispatch once the oversight came to their attention. Although there is limited evidence of specific prejudice to the plaintiff from ICBC's delay, the general prejudice from a change in the mode of trial just two months before the scheduled trial date and the real likelihood that the trial will be adjourned are sufficient, in my view, to conclude on a balancing of the relevant factors that it is not in the interests of justice to grant an extension of time.
- [66] For these reasons, the defendants' application to extend the time to file a jury notice is dismissed. Costs of this application will be in the cause.

"Master Elwood"

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