

CANADA / JUDGMENT

Cook v. McEwen

2025 BCCA 325

COURT

British Columbia Court of Appeal

DECIDED

19 September 2025

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2025 BCCA 325 Cook v. McEwen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cook v. McEwen,

2025 BCCA 325

Date: 20250919

Docket: CA50200

Between:

Elaine Cook

Appellant

(Defendant)

And

Jaelene McEwen

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Donegan

The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated

October 2, 2024 (McEwen v. Cook, Penticton Docket M39435).

Counsel for the Appellant:

D.M. Darman

R.L. LaGroix

Counsel for the Respondent:

M. Selly

Place and Date of Hearing:

Vancouver, British Columbia

May 16, 2025

Place and Date of Judgment with Written Reasons to Follow:

Vancouver, British Columbia

May 16, 2025

Place and Date of Written Reasons:

Vancouver, British Columbia

September 19, 2025

Written Reasons of the Court

Summary:

This appeal from an order striking a Jury Notice was allowed with reasons to follow. The chambers judge considered the case to be one where issues of divisibility and allocation would be complex and render a case unsuitable for a jury. However, the evidence before the court was that these would not be issues for the jury. The chambers judge erred in giving weight to irrelevant considerations and the case falls wholly outside those in which a jury can be properly excluded.

Reasons for Judgment of the Court:

Introduction

- [1] This appeal was allowed on May 16, 2025, with written reasons to follow.
- [2] The issue before us was whether the chambers judge had correctly interpreted and applied Rule 12-6(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which provides, in part:
 - (5) Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) [requiring that the trial be heard by the court with a jury] 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 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

Background

- [3] In March 2015, the respondent (plaintiff in the trial court) commenced an action for damages arising out of a motor vehicle accident founded upon allegations very succinctly described in the notice of civil claim as follows:

The Collision

3. On or about March 29, 2013, the Plaintiff was a passenger in a motor vehicle stopped for traffic on Preston Avenue, in the City of Penticton, Province of British Columbia, when it was struck from behind by a motor vehicle, owned and being then and there negligently operated by the Defendant.

The Plaintiffs' Injuries

4. As a result of the negligence of the Defendant in the collision as aforesaid, the Plaintiff suffered severe personal injuries, including the following:
- a) Head;
 - b) Face;
 - c) Jaw;
 - d) Teeth;
 - e) Neck;
 - f) Shoulders;
 - g) Back;
 - h) Arms/hands
 - i) Left hip;
 - j) Legs, ankles & feet;
 - k) Sleep disturbance;

- l) Cognitive impairment;
- m) Anxiety;
- n) Depression.

Damages

5. As a further result of the aforementioned injuries, the Plaintiff has suffered and continues to suffer severe pain, wage loss, loss of earning capacity, diminished homemaking capacity, loss of amenities of life and she remains unable to enjoy her normal recreational activities.
- [4] The appellant (defendant in the trial court) was equally succinct in her pleading. She admitted liability and made only the following additional allegations of facts:
- 1 The plaintiff sustained no injury, loss, damage or expense as a result of the collision.
- 2 The defendant says that, at the time of the within collision, the plaintiff:
- a) failed to wear, properly adjust and securely fasten the complete seatbelt assembly, and failed to properly adjust the headrest devices installed in the motor vehicle in which the plaintiff was riding.
- [5] The appellant filed a Notice Requiring Trial by Jury on November 10, 2023.
- [6] On September 18, 2024, the respondent filed an application for an order striking the Jury Notice, and to extend the time for doing so. In support of her application, she claimed that subsequent to the March 29, 2013 accident, she had been injured in three further motor vehicle accidents in Alberta: two in 2014 and 2018, which resulted in claims that were settled, and one in 2015 in which she suffered no injury.
- [7] She described this action as "a complicated lawsuit in which voluminous medical records, medical-legal reports, and an economist report will be reviewed", and asserted the trial would require many experts to testify "on a variety of complex medical and economical issues" of an intricate and complex character that would require the trier of fact to "engage in difficult scientific investigation".
- [8] She asserted the trier of fact would be required to determine whether her injuries, including chronic pain syndrome (fibromyalgia); whiplash; thoracic and lumbar strain; temporomandibular joint disorder; post-traumatic migraines; and post-traumatic stress disorder, are the indivisible result of multiple accidents or not--a point of contention between the parties.
- [9] She expressed her intention to adduce in evidence a large volume of medical records and medical-legal reports detailing the extent and nature of her injuries.
- [10] She argued:

Due to the separate jurisdictions and tortious acts, the Defendant in the BC MVA Action and the defendants in the [Alberta MVA actions] have not been able to third party one another to share liability for damages either severally or jointly. It is for the trier of fact to arrive at a determination of liability for the Plaintiff's injuries, but given the inability of the Defendant to third party other potentially liable parties the task at hand is legally novel and complex--in other words, it is not a straightforward analysis in determining liability given that other severally or jointly liable parties are, for the purposes of [this action], absent.

[11] She described the allegation of contributory negligence as "yet another issue for the trier of fact to resolve [which] would impact apportionment of damages".

[12] She argued:

Further at issue is the question of quantum and assessment of damages, and how the previous settlements in the [Alberta MVA actions] may be deducted or otherwise factored into any damages awarded under the trial of [this action]. As with the legal complexity of indivisible injuries, and the novelty of apportioning liability in the absence of potentially liable third parties, factoring previous settlements into a damage award is likewise legally complex and intricate which a jury would find difficulty with.

[13] Finally, she asserted:

There exist also a number of issues to resolve in respect of the Plaintiff's wage loss claim. At the time of the [subject accident], the Plaintiff worked as a teacher at Edmonton Public Schools under various collective agreements. She subsequently completed her master's degree in education, and had plans to advance her career. There are further issues complicating the Plaintiff's income loss claim, including the factor of her pension and of any contingencies. An economist report will be adduced by the Plaintiff in support of her claim, which will require thorough examination by the trier of fact and determination of the issues as raised.

[14] In response to the application, the appellant claimed that there was substantial evidence that the plaintiff suffered from chronic pain or fibromyalgia prior to the 2013 motor vehicle accident, and argued that the issues of significance for the jury would be:

- 1) whether the plaintiff had an existing chronic pain condition before the March 23, 2013 accident, and
- 2) whether or not the 2013 accident changed the trajectory of that condition.

[15] The appellant asserted there are no novel or unusual medical or scientific issues in this case and while the opinions of the two physiatrists who have examined the plaintiff differ, it is only with respect to the weight they attribute to the plaintiff's account of the course of her injuries as compared to the contemporaneous records.

- [16] The chambers judge was advised the respondent intended to rely on four reports at trial from three experts: a physiatrist, Dr. Jamie Irvine; a neuropsychiatrist, Dr. Jeremy Quickfall; and an economist, Nicholas Coleman. The appellant intended to rely on one expert report from a physiatrist, Dr. Hernish Acharya, in which he expressed the opinion that the respondent had a "long standing pre-existing chronic pain syndrome".
- [17] Dr. Irvine prepared two reports, one in April 2021 and one in August 2024. In the 2021 report, he diagnosed the respondent as having fibromyalgia, whiplash associated disorder type II, thoracic strain, lumbar strain, temporomandibular joint disorder, post-traumatic migraine headaches, and post-traumatic stress with secondary anxiety disorder/panic attacks (although this last diagnosis would require further assessment by a psychologist or psychiatrist). He said the whiplash, thoracic strain and lumbar strains were an aggravation of pre-existing neck pain. He was of the opinion that "the temporal relationship between the 2013 motor vehicle accident and her ongoing symptoms is challenging because Ms. McEwen did have prior motor vehicle collisions with persistent chronic neck, mid back and lower back pain", although he concluded overall that the accident had significantly aggravated her pre-existing symptoms and increased the severity of her fibromyalgia. His 2024 report was substantially similar to and often referred back to the 2021 report.
- [18] In his June 2024 report, Dr. Quickfall diagnosed the respondent as having a somatic symptom disorder with predominant pain. With respect to causation, he wrote: "[t]he issues around causality relating to the chronic pain syndrome are complex and deferred to other more appropriate experts". While saying that her psychological symptoms became "more germane" after the 2013 accident, he went on to say that all her accidents--before and after 2013--have likely contributed to the development of her disorder.
- [19] The economist, Mr. Coleman, provided tables estimating the respondent's past and projected future income losses based on her employment as a schoolteacher working under the collective agreements in place at the relevant times in Alberta. He made sample calculations based on different scenarios as to when the respondent would have retired, and various un-employment and under-employment contingencies. He also provided estimates of her losses of pension entitlement on the basis that she retired early (in 2020). He provided illustrative calculations using his tables and noted that he was able "to provide alternative multipliers, earnings estimates, and sample calculations based on alternate assumptions upon request".
- [20] The appellant advised the chambers judge she would not require the respondent's economist to attend trial for cross-examination, and that she was not contesting the economist's calculations--only the contribution of the litigated accident to the respondent's loss.

Judgment below

- [21] The chambers judge "summarily" extended the time for applying to set aside the jury notice because counsel for the plaintiff "did not lie in the weeds" (at para. 5), but had raised the issue with respect to the Jury Notice with defence counsel shortly after the deadline for the exchange of expert reports and proceeded to hearing in a timely way thereafter.
- [22] The judge's analysis of the substantive relief sought was brief:
- [12] On a superficial basis, Yeung [Yeung v. Xu, 2024 BCSC 773] would suggest that this matter is suitable for a jury. The length of the trial is not inordinate. There is not a plethora of experts. There are a number of documents listed, but it is far from clear given that many of them are clinical records from service providers who are not being called and thus have, as discussed in the course of submissions and I believe recognized by both counsel, a somewhat limited and specific role.
- [13] Balanced against that are some, I accept, quite complicated issues regarding the concept of indivisible injury and extraprovincial personal injury settlements. Moreover, while the number of experts might not be out of the ordinary for even a straightforward personal injury action, the economist's report tendered on behalf of the plaintiff in this matter contains a variety of scenarios that even with the benefit of the report's author guiding someone through it are going to be complicated for the trier of fact. That evidence, given the past and most importantly future wage-loss claim being advanced by the plaintiff and subject to cross-examination, have to be explained and understood with context of recent Court of Appeal authority and following jurisprudence on future wage loss.
- [14] In consideration of all of the factors and without disregard for any of those that I have not specifically mentioned, I am satisfied that trial fairness, as judicially interpreted in the collection of authorities provided, warrants granting the relief sought by the plaintiff. As a backstop to this, I am specifically stating that I am not satisfied there is actual prejudice to the defendant in switching their trial strategy in preparation to a judge-alone trial some approximately six weeks prior to the commencement of trial. I do not consider that to be material prejudice.

Argument on appeal

- [23] Before us the appellant acknowledged that deference is owed to the judge's answer to both questions on an application to strike a jury: first, whether the issues require a prolonged examination or a scientific or local investigation or are of an intricate or complex character, and second, if so, whether in all of the circumstances the case should proceed with a jury: Wallman v. Gill, 2013 BCCA 409; Rados v. Pannu, 2015 BCCA 459.
- [24] She contended the chambers judge made palpable and overriding errors in determining that the issues for the jury were complex. The judge identified three complicated issues:

- a) the "concept of indivisible injuries";
 - b) the "extraprovincial personal injury settlements"; and
 - c) the economist's report, containing a "variety of scenarios that are going to be complicated for the trier of fact".
- [25] The appellant submitted these were misapprehensions constituting palpable error as the evidence on the application established that the identified issues were unlikely to arise for the jury or to be complex in nature.
- [26] In fact, the appellant noted the respondent had been involved in six collisions: the subject accident in 2013; the 2014 and 2018 collisions in Alberta, for which she received some settlement in compensation; an accident in 2015, in which she suffered no injury; and two prior accidents, in 2005 and 2009 respectively. However, she asserted divisibility of injuries is not likely to be an issue at trial as there is agreement between the experts that the 2013 accident contributed to the respondent's ongoing pain and disability. None describes a distinct, divisible injury. Where only one defendant is before the court, the trier of fact does not need to distinguish between multiple tortfeasors who contribute to an indivisible injury. Rather, the jury will have to determine what award is appropriate to compensate the respondent for all damages to which the appellant's negligence is found to have contributed.
- [27] Post-judgment, the appellant may apply to the trial judge to have the settlements from the Alberta accidents deducted: *Ashcroft v. Dhaliwal*, 2008 BCCA 352. The appellant said: "[t]o paraphrase *Ashcroft* at para. 21, settlement effectively apportioned the damages although the proportionate shares would not be known until the jury had made the global assessment required in the case of an indivisible injury". The appellant said it is a misapprehension, and an error of law, to regard the question of apportionment between accidents as a task for the jury in this case.
- [28] The appellant's position was that it is irrelevant that the settled claims were in Alberta.
- [29] Finally, the appellant contended the claim for economic loss is simple and made simpler by Mr. Coleman's report. The respondent was working as a teacher in 2013. She stopped working in 2020, at the age of 47. The appellant does not agree that the 2013 accident contributed to her loss of earnings, or her decision to stop working, but takes no issue with the economist's calculations, in particular with his calculation of the amount the respondent would have earned if she had worked continuously up to the date of trial based on three scenarios:
- a) the respondent continuing to work at her 2020 pay scale;
 - b) the respondent obtaining a master's degree and moving up the teaching pay scale; and
 - c) the respondent obtaining a master's degree and becoming a curriculum writer.

- [30] Similarly, the economist's estimate of potential future income losses was based on those three scenarios with two possible end dates: her earliest possible retirement with a full pension (in 2032) and the end of the school year in which she turns 65 (2038). These estimates accounted for demographic averages with respect to unemployment, part-time work, and non-participation in the labour force.
- [31] The appellant argued that if the respondent establishes that the 2013 accident contributed to her inability to work, the jury will have to address three relatively straightforward questions:
- a) But for the accident, how likely is it that the respondent would have earned a master's degree;
 - b) How likely is it that she would have, with a master's degree, become a curriculum writer; and
 - c) For the scenarios that you find reasonably possible, how long was she likely to work?
- [32] From the appellant's perspective this is not a case where the plaintiff's foregone income is a hypothetical possibility, as in the trilogy of cases referred to (obliquely) in para. 13 of the reasons (*Rab v. Prescott*, 2021 BCCA 345; *Dornan v. Silva*, 2021 BCCA 228; and *Lo v. Vos*, 2021 BCCA 421).
- [33] The appellant submitted:
21. To fulfill its role as judge of the facts, a jury will not be called upon to appreciate the nuances of Mr. Coleman's present value-calculations or to absorb the collective agreement for Alberta teachers. Rather, the jury will need to be directed to the parts of Mr. Coleman's opinion that relate to the few factual questions they will be called upon to decide, assuming they find that the test for causation is met.
 22. For example, counsel may wish to draw a jury's attention to page 21 of Mr. Coleman's report for his entirely uncontroversial opinion that the value of her future earnings, assuming that she would have obtained a master's degree, is \$768,753 were she to have worked until 2032, or \$1,293,539 to age 65.
 23. There was nothing before the application Judge to suggest that the jury could not be readily led to the salient parts of Mr. Coleman's report by the combination of his explication in direct examination and counsel's closing submission. Indeed, given defence counsel's explicit concession, there is every reason to think that the most relevant calculations could have been put before a jury as admissions.
- [34] She argued that the chambers judge erred in principle when she treated the length of trial and number of experts as "superficial" matters, when those questions were close to the core of the issue she was called upon to decide: whether the evidence and instructions could be understood and retained by a jury over the length of the trial. This was said to amount to a legal error: failure to consider a relevant factor.

- [35] Finally, the appellant noted one factor the chambers judge did cite in her analysis: the lack of prejudice to the defendant resulting from switching the mode of trial at a late stage, was not relevant to the exercise of the discretion to strike the jury, but pertained only to the application for leave to extend the time within which to bring the application.
- [36] In reply, the respondent said it was open to the chambers judge to find that indivisibility, multiple settlements, the economist's report, and the assessment of past and future wage loss in the context of recent appellate decisions, taken together were "likely to arise as issues for a trier of fact and were of a complex nature".
- [37] She noted indivisibility of injury and apportionment of damages have been found to be too complex a task for a jury: *Pajger v. Williams et al.*, 2003 BCSC 1542.
- [38] She said: "[i]t was not the geographic location of the extraprovincial settlements which made them complex, but rather the fact that the other tortfeasors were not before the court".
- [39] The respondent said the chambers judge considered a confluence of factors which made the underlying action inappropriate for trial by jury. While each in isolation might be uncomplicated, as alleged by the appellant, she contended the combination of these factors persuaded the chambers judge that trial by jury would impede trial fairness.
- [40] The respondent argued that if she is found to be contributorily negligent, the assessment of damages will become more complicated and the liability of the appellant for damages will be several, rather than joint and several.
- [41] She contended the assessment of damages, particularly the past and future loss of income, will be complex because the appellant will seek contingency deductions consistent with the approach determined in the cases referred to by counsel as the "trilogy" of recent appellate decisions on damages. She said: "[t]his is a very difficult task and too complex for a jury to undertake within a few hours or days of deliberations".
- [42] Further, she says there is no indication that the chambers judge treated the length of trial and number of experts as "superficial" but, rather, she was very alive to the considerations unique to this case and considered how it differed from *Yeung*.
- [43] In response to the appellant's argument that prejudice is an irrelevant factor in the second stage of analysis of a jury strike application, or that certain factors were not explicitly addressed, the respondent asserted the chambers judge's discretion was broad and the list of factors provided in the jurisprudence is non-exhaustive, meaning a judge may validly consider prejudice as part of this stage of inquiry.

Discussion

- [44] Absent an error of law, this Court should not interfere with the discretionary decision of a chambers judge to strike a jury notice unless it is clearly wrong: *MacPherson v. Czaban*, 2002 BCCA 518 at paras. 9-11.

- [45] In *Rados*, an appeal from an order refusing to strike a jury, Justice Harris, for the Court, wrote:
- [2] The appellant acknowledges that the decision whether to strike a jury notice engages the court's discretion. Accordingly, to succeed on this appeal the appellant must demonstrate that the chambers judge made an error in principle. He does not dispute the test set out by this Court in *Wallman v. Gill*, 2013 BCCA 409 at paras. 7-8:

The decision to strike a jury notice is a discretionary one that relates to the management of a trial and may not be interfered with lightly on appellate review: *MacPherson v. Czaban*, 2002 BCCA 518. Absent an error of principle, or failure to give sufficient weight to all relevant considerations, deference must be accorded to such an order.

The legal test to be applied on review of a discretionary order is whether the judge "has given weight to all relevant considerations": *Mining Watch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 at para. 43.

- [46] Where the judge has not given weight to all relevant considerations or where the case "falls wholly outside those in which a jury can be properly excluded" the order striking the jury may be set aside: *Ball v. Novlesky*, [1981] B.C.J. No. 677 (C.A.). In our view, this is such a case.
- [47] The respondent is correct to say that issues of divisibility and allocation may be complex and render a case unsuitable for a jury. However, these will not be issues in this case. There is no evidence that the respondent suffered a distinct divisible injury in 2013, and no reasonable prospect of a finding of contributory negligence. Contributory negligence is pleaded as a boilerplate defence in this case, but, by the appellant's admission, is unsupported by evidence. In our opinion, the chambers judge erred in considering the fact that there were multiple accidents or that some were "extraprovincial" to be complicating factors in this case.
- [48] Further, the appellant is correct to say the chambers judge erred in considering the analysis the jury might be required to undertake in this case to be similar to the analysis described in *Rab, Dornan and Lo*. In *Rab*, after reviewing a number of leading cases, Justice Grauer observed:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.

- [49] The appellant rightly points out that in the case at bar, the evidence is that the respondent stopped working at a specific job on a specific date and she attributes her income loss to specific existing symptoms. The claim is not hypothetical. The task of the jury is to answer a limited number of questions, not to engage in the complicated task envisaged in *Rab*. The appellant says, and we agree, that if the future income loss claim in this case is too complex for a jury, then no claim for future income loss can go before a jury. When considering the assessment of the evidence of income loss in this case we must consider the observation in *McDonald v. Inland Natural Gas Co. Ltd.*, [1966] B.C.J. No. 40 (QL), 1966 CanLII 580 (C.A.), restated by Justice Craig in *Nichols v. Gray* (1978), 9 B.C.L.R. 5, 1978 CanLII 407 (C.A.) at para. 12, that a plaintiff is entitled to trial by jury, except in certain types of cases specified in the Rules, and can be deprived of this right only if a party opposing a trial by jury establishes "clearly" that one or more of the exceptions is applicable.
- [50] It is true that the chambers judge hearing an application to strike a jury must look at the case as a whole and multiple issues can collectively contribute to the complexity of the jury's task. However, it is our view that there are not such multiple complicating issues in this case. The chambers judge identified three, of which two ought not to have been factored into the analysis: divisibility of the injury and the fact some accidents occurred in Alberta. The third, the necessity of understanding and weighing the economist's evidence, standing alone, is insufficient basis for setting aside a jury notice.
- [51] For these reasons, we have allowed the appeal and set aside the order striking the Notice Requiring a Trial by Jury.

"The Honourable Mr. Justice Willcock"

"The Honourable Justice Donegan"

"The Honourable Justice Warren"

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