CANADA / JUDGMENT

Cooper v. Jordan

2004 BCSC 783

COURT	DECIDED
Supreme Court of British Columbia	19 May 2004

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2004 BCSC 783 Cooper v. Jordan et al IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cooper v. Jordan et al. 2004 BCSC 783 Date: 20040519 Docket: 03-3870 Registry: Victoria Between: Victoria Cooper Plaintiff And: Paul Douglas Jordan and Judith Elaine Jordan Defendants Before: Master Bolton Oral Reasons for Judgment In Chambers May 19, 2004 Counsel for Plaintiff: K. Kjellander Counsel for Defendants: J. Young Place of Hearing: Victoria, B.C.

[1] THE COURT: This is an application to remove motor vehicle litigation from the fast track.

[2] First of all, I preface these reasons by accepting that the relatively recent amendments to Rule 66 do somewhat affect the practice that will have to be followed under these applications. I am satisfied, as Master Groves pointed out in one of the decisions that was cited to me, I think it would be the Pardanyi case, yes, Pardanyi v. Wilson, [2004] B.C.S.C. No. 193, the decision filed January 7th, 2004, that the amendments to Rule 66 do, to some extent at least, affect the practice in the sense that now the onus of proof has been shifted to the applicant to remove something from the fast track and to show that the matter is not appropriate for Rule 66.

[3] Accordingly, I would be inclined to say that my own decision in Ram v. Pointner is now somewhat wide of the mark. When I spoke in that case of there having to be a reasonable prospect that the matter could be completed in two days, it seems to me that it should now be necessary to show quite clearly that the matter cannot reasonably be expected to be completed in two days, and that so long as there remains a rational possibility that it can be completed in two days, even if it is somewhat unlikely or even perhaps very unlikely, the matter should stay on the fast track until it becomes clear that it cannot be. Obviously, the further away from trial these applications are brought, the greater will be the uncertainty of the issues to be canvassed at trial and number of necessary witnesses, and so on, and consequently the harder will be the task of the applicant.

[4] Bearing that in mind, I am satisfied that it is premature to bring this application today because I am not satisfied that the trial necessarily will take more than two days, although I must say I think it is fairly likely that it will do. I think as the parties get closer to trial, and what is now conjecture becomes definite strategy or plans, then it will probably become apparent that the witnesses are going to take so long to get through their evidence that they

cannot reasonably be expected to complete it in two days, but for the moment, I am not satisfied that that is so clear that the advantages of Rule 66 should be dispensed with.

[5] I say that, although I have some difficulty with some of the estimates for the length of examination of witnesses given by the plaintiff. In particular, given that liability is a serious issue here, as well as the extent of pre-accident injuries and the potential at least for post-trial injuries giving rise to some aspects of the claim, the estimate of 40 minutes for direct examination of the plaintiff seems likely to be drastically wide of the mark, even if we discount the possibility of any unexpected complexities. If the matter becomes as complex as it remains in the pleadings, then it is an absolute certainty that 40 minutes is going to be way wide of the mark.

[6] My own best guess would be something in the region of half a day or possibly even three-quarters of a day for direct examination of the plaintiff alone, but for the time being, although I am satisfied that 40 minutes is not sufficient, it may not be all that far off. Also, I note the plaintiff's estimates of five minutes for each of four doctors whom he does not intend to call himself but simply to make available for cross-examination. Depending on how things go, that may be unnecessary. There may be only a couple of minutes in total there for those doctors, which would allow some leeway for examination of the plaintiff. Beyond that, everything is really speculative.

[7] I cannot accept the time estimates of the defendants, because they are predicated on a jury trial. I take judicial notice of the fact that time estimates are often, not invariably but often, specified in pre-trial conferences to be significantly more if a jury is going to be empanelled than if the same witness will be led through their evidence before a judge alone. Since the defendants' time estimate was predicated on a jury trial, I cannot accept some of those estimates. Some of them on the face of it look fairly reasonable, even with a judge alone. Some potentially are a bit exaggerated. Some may very well turn out to be under the mark, depending on how the issues develop, but as I say, it is simply too early to say yet.

[8] I think that is more or less all that I have to say on the current application. I have not taken the time to put my notes in order, and I am conscious that I have been rambling into a bit more detail perhaps than is really necessary, but to put it fairly succinctly, at this stage I am not satisfied that the trial estimates given by either party are particularly reliable, but it does seem to me to be possible, although only barely, that this matter can be dealt with in two days if everything goes extremely well from the plaintiff's point of view. Given that that remains a rational possibility, it is my view that the matter should remain under Rule 66 unless or until it becomes clearer that the matter cannot be.

[9] I might have changed my view of the situation if there were any evidence from the defendant that the uncertainty as to the manner of trial is causing any difficulties in preparation of the case, but there is no such evidence. In the absence of such evidence, it would seem to me to be perfectly easy for the defendant to come along and bring another application at any time when the matter becomes clearer, and in those circumstances, I am

satisfied that the clear benefits to the system as a whole represented by Rule 66 should be kept intact.

[10] I will make one further comment directed to the plaintiff which relates to the pleadings. If the matter does come back closer to trial and the plaintiff still wishes to resist removing it from Rule 66, then the analysis is probably going to be much more rigorous then is possible now. At that time, it seems to me that the plaintiff would be well advised to consider amending the statement of claim to delete any particulars of injury or loss that will not be pursued at trial.

[11] As things stand, relevance is governed by the pleadings, so some time estimate is going to have to be given to deal with matters that remain potentially subject to a claim being made at trial. So if by the time of a renewed application, which I must confess I do anticipate being brought here, if the plaintiff is satisfied that she is not going to be claiming for loss of future earnings, or what was that odd claim that struck me, premature aging or something along those lines, then the pleadings had better be amended; otherwise, the court will have to assume that that is going to be the subject of at least a few minutes' worth of evidence.

[12] In the circumstances, however, the application is dismissed without prejudice to the right of the defendant to renew the application somewhat closer to the trial date. The costs of the application to the plaintiff in any event of the cause.

[13] MR. KJELLANDER: Thank you, Your Honour.

[14] MS. YOUNG: Thank you, Your Honour. "Master N. Bolton"

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