

CANADA / JUDGMENT

Coulson v. Sra

2001 BCSC 914

COURT

Supreme Court of British Columbia

DECIDED

21 June 2001

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2001 BCSC 914 Docket:

S043972

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LANCE LINDSAY COULSON
PLAINTIFF

AND:

SUKHPAL SINGH SRA, NORTH SHORE TAXI (1966) LTD., AND
TIM MORRISON
DEFENDANTS

REASONS FOR JUDGMENT

OF

MASTER BRINE

Counsel for Plaintiff H. Smith

Counsel for Defendants D. Neumann

Date and Place of Hearing/Trial: June 13, 2001

New Westminster, BC

- [1] In the matters presently before me, the plaintiff applies to have the Notice Requiring Trial By Jury ("Jury Notice") filed on behalf of the defendants struck out as not having been filed in time. This application is brought pursuant to Rules 39(27) and 3(2). The defendants' position is that they need not apply to extend the time to file their Jury Notice as the plaintiff's application to strike the Jury Notice was not brought within the time required to do so.

Alternatively, the defendants apply, pursuant to Rules 39(26) and 3(2) to extend the time required to file the Jury Notice.

- [2] In this case, the plaintiff was injured in a motor vehicle accident on June 7, 1997. An action was commenced and pleadings were closed.
- [3] On July 23, 1998, a Notice of Trial was filed and subsequently delivered to counsel for the defendants. This was the first or original Notice of Trial. Trial was to commence for three days on April 21, 1999. On April 16, 1999, the trial was ordered adjourned upon the plaintiff's application. At that time the plaintiff alleged that he may have been rendered unconscious in the motor vehicle accident and further alleged that he may have suffered a traumatic brain injury as a consequence.
- [4] On October 28, 1999, the parties re-scheduled, by praecipe, the trial for three days commencing October 17, 2000. On August 31, 2000, the parties, by consent, adjourned the October 2000 trial. On November 2, 2000, a second Notice of Trial was filed setting the matter for trial for eight days commencing May 6, 2002. I note that such a Notice of Trial is unnecessary and the trial should properly have been re-set by Praecipe. On November 16, 2000, counsel for the defendants filed a Jury Notice. On January 24, 2001, counsel for the plaintiff wrote to counsel for the defendants. He took the position that the Jury Notice was filed out of time and that the time for doing so expired 21 days following delivery of the original Notice of Trial, viz., 21 days after delivery of the July 23, 1998 Notice of Trial.
- [5] In the course of submissions, I was referred to a number of authorities. These included *Hoare v. Firestone Canada Inc.*, 65 D.L.R. (4th) 455; *Smithe v. Vancouver General Hospital*, [1981] B.C.J. No. 1723; *Robertson v. CIBC*, [1994] B.C.J. No. 2594 (B.C.C.A.); *Ngai v. Cho*, [2001] B.C.J. No.383; *Seysener v. Gelpke*, [1999] B.C.J. No. 19; *Lanci v. Marpole Transport Ltd.*, [2000] B.C.J. No. 1701.
- [6] The decision of the Court of Appeal in *Hoare* is clear. The time for filing a Jury Notice is within 21 days after the delivery of the original or first Notice of Trial. In this action, that date was the date of delivery of the Notice of Trial of July 23, 1998. Beyond that, the Jury Notice may only be filed with the consent of the court upon certain criteria being met. One of these criteria is to satisfy the court that the party wishing to file the Jury Notice had the express intention of doing so during the time period so limited (viz. within 21 days of the delivery of the first Notice of Trial) and that the failure to do so was attributable to the inadvertence or neglect of the party's solicitor. Alternatively, the court must be satisfied that the desire to file a Jury Notice beyond the required time was due to a fundamental change in circumstances.
- [7] Counsel for the defendant takes the position that it may file the Jury Notice at any time and that it is valid unless and until the opposing party applies, within the time limited for doing so, to set aside the notice. With respect, in my opinion this position is incorrect. In *Lanci*, Master Joyce (as he then was) concluded that the failure to file a Jury Notice within the appropriate time period was not a mere irregularity but a nullity which may only be cured

by leave of the court upon application by the party seeking to issue the Jury Notice. I agree with that conclusion for the reasons expressed therein.

- [8] Further, in *Robertson*, Mr. Justice Goldie, for the majority, concluded that once the initial period for electing the mode of trial (i.e. by judge or jury) has expired, a re-election can only be made with leave of the court.
- [9] Having concluded that the Jury Notice was a nullity due to its late filing, I need not consider whether the application by the plaintiff to set aside the Jury Notice was brought within the time required by Rule 39(27). However, I do consider that such an application to set aside a Jury Notice is only necessary when the Jury Notice has been validly issued pursuant to Rule 39(26).
- [10] I turn now to the defendants' application for an order to extend the time to file the Jury Notice.
- [11] The grounds for granting leave to file a Jury Notice after the time limited for doing so are well settled. Firstly, the party seeking to do so must establish, to the satisfaction of the court, that the intention or wish to do so existed or was present during the time so limited (*Hoare*) and that the failure to do so was due to the inadvertence or neglect of counsel (*Smith; Ngai*). In the alternative, the party must satisfy the court that the circumstances of the action had so materially or fundamentally changed following the time limited for filing a Jury Notice that it would be appropriate to allow such a notice to be filed late (*Hoare*). Finally, the party receiving the late-filed Jury Notice may consent to the notice.
- [12] In the case before me there clearly is no consent from the plaintiff. Neither is there any suggestion that the defendant had any intention to seek a trial by jury within the 21 days following the delivery of the Notice of Trial. Therefore, in order to succeed, the defendant must demonstrate that the circumstances of this action have fundamentally or materially changed since the time required to file the Jury Notice. I should also add that, in my view, the defendant must act promptly when faced with such a change in circumstances to elect to change the mode of trial and to apply to the court for leave to do so.
- [13] In this regard, the defendants point to the fact that the plaintiff's claim was initially one for soft tissue injuries. They say that the claim, based on the available medical evidence at the time the Notice of Trial was filed, was straightforward and that, therefore, they did not intend to proceed with a jury trial.
- [14] In April 1999, affidavit material filed in relation to the application to adjourn disclosed that the plaintiff may have sustained a traumatic brain injury as a consequence of the accident.

- [15] The affidavit of Jeff Dilworth, an insurance claims adjuster, filed in support of the defendants' application states, at paragraph 10, "Between October 20th, 1999 and August 17th, 2000, the medical data and reports concerning the Plaintiff's alleged brain injury became so voluminous, that the extent and nature of the claim changed dramatically as opposed to when this matter was first set for Trial in July 1998."
- [16] In support of the contention that the plaintiff's claim has changed dramatically, the defendants refer to the reports of Dr. Bozek (Feb. 16, 2000), a neurologist, and Dr. Coen (June 29, 2000), a psychologist. Dr. Coen opines that the plaintiff has some degree of cognitive impairment attributable to the accident. It is the defendants' position that his present complaints are more likely attributable to factors independent of the accident.
- [17] The test to be applied as set out by Master Patterson in *Seysener* is "...whether the character of the action has been so materially altered as to render it clearly appropriate for a jury trial when as originally brought it clearly was not."
- [18] In summary, I conclude that the law with respect to Jury Notices which are filed outside the time contemplated by Rule 39(26) is as follows:
1. A Jury Notice that is not filed within twenty-one days of the delivery of the Notice of Trial is a nullity and cannot be cured by the application of Rule 2.
 2. In order to file a Jury Notice beyond the time permitted to do so, leave of the Court must be obtained.
 3. The grounds for considering such an application will be:
 - 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 that failure to have done so was due to inadvertence or neglect on the part of the applicant or the solicitor;
 - 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 clearly was not during the time allowed for filing a Jury Notice; or,
 - c. that the parties have consented to the late filing.
 4. Such an application must be brought in a timely manner.
 5. A validly issued Jury Notice may be set aside upon application pursuant to Rule 39(27), which application is subject to the provisions of Rule 2.
- [19] On the evidence before me, I cannot conclude that when the Notice of Trial was originally filed the action was clearly not appropriate for a jury trial. Indeed, there are many instances where defendants file Jury Notices in actions where nothing more than a soft tissue injury claim is being made by a plaintiff.

- [20] Further, there is nothing from the medical information before me from which I can conclude that the action is so materially different that a jury trial is now "clearly appropriate." The claim throughout has been one for damages for personal injury. While the particulars of the claim may have expanded, they have not, in my opinion, so materially altered the character of the action as to meet the test set out above.
- [21] Although I need not do so for the purposes of this decision, I also find that the defendants have not applied to extend the time for filing the Jury Notice in a sufficiently timely manner. One would have expected an application to do so shortly following the April 1999 disclosure that the plaintiff was now alleging a brain injury. Alternatively, it was, at the very least, incumbent upon the defendants to apply once they had received the reports of Drs. Bozek and Coen early in 2000.
- [22] In the result, therefore, I have determined that the Jury Notice filed by the defendants on November 16, 2000 is to be struck out. In addition, the application of the defendants to extend the time for filing the Jury Notice is dismissed.
- [23] The plaintiff is entitled to costs of one application at Scale 3, payable in any event of the cause.

"Master Brine"

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