

CANADA / JUDGMENT

Donaldson v. Dorworth

2017 BCCA 236

COURT

British Columbia Court of Appeal

DECIDED

14 June 2017

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2017 BCCA 236 Donaldson v. Dorworth

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Donaldson v. Dorworth,

2017 BCCA 236

Date: 20170614

Docket: CA43859

Between:

Shannon Jean Donaldson

Appellant

(Plaintiff)

And

Gloria Angela June Dorworth

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Hunter

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

July 26, 2016 (Donaldson v. Dorworth, 2016 BCSC 1385,

Nanaimo Registry No. M69767)

Oral Reasons for Judgment

Counsel for the Appellant:

I.D. McIver

B.T. Durvin

Counsel for the Respondent:

A.M. Gunn, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 14, 2017

Place and Date of Judgment:

Vancouver, British Columbia

June 14, 2017

Summary:

The appellant is plaintiff in a personal injury case scheduled for trial in February 2018. The defendant filed a notice to have the trial heard by a jury. The appellant applied unsuccessfully to strike the jury notice. On appeal, held: Appeal dismissed. The decision whether to strike a jury notice involves an exercise of discretion relating to trial management to which deference must be given to the trial court. The chambers judge considered the relevant factors and was satisfied the case could be fairly heard by a jury. No error of principle was shown. There was no basis for intervention by this Court.

- [1] HUNTER J.A.: This is an appeal from a judgment of the case management judge in a civil action, dismissing an application to strike a jury notice.
- [2] The appellant was injured in a motor vehicle collision that took place in 2012 on Salt Spring Island. She has sued the respondent for damages arising from that collision. The respondent has denied liability and issued a Notice Requiring Trial by Jury pursuant to Rule 12-6 of the Supreme Court Rules.
- [3] A party to a personal injury case is presumptively entitled to a trial by jury. It is only when a judge is satisfied that the issues cannot be tried fairly by a jury that a jury notice can be struck. The procedure to challenge a jury notice is set out in Rule 12-6(5) of the Rules of Court as follows:

- (5) Except in cases of defamation, false imprisonment and malicious prosecution, 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 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, or
 - (b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).
- [4] The appellant brought an application to strike the jury notice pursuant to this sub-rule before the judge who was case managing this action and who is scheduled to be the trial judge. Her position was that this case was not suitable for a jury as it met the requirements of sub-paragraphs (i) and (ii), namely that the issues require prolonged examination of documents or a scientific investigation that cannot be made conveniently with a jury, or the issues were of an intricate or complex character, or both. The case management judge did not accede to these arguments, and dismissed the application.
- [5] The decision whether to strike a jury notice involves an exercise of discretion to which deference must be given by this Court. In *Wallman v. Gill*, 2013 BCCA 409, this Court described the standard of appellate review at paragraphs 7-8:
- [7] 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.
- [8] 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.
- [6] In addition, this Court has recently pointed out that "a decision whether to strike a jury notice is not only discretionary, but also engages important issues of trial management. The determination of such issues is properly a matter for the trial court:" *Rados v Pannu*, 2015 BCCA 459, at para. 22.
- [7] The trial of this action is scheduled to take four weeks. Counsel for the appellant advises us that 16 medical witnesses are expected to testify on factual matters, and another 12 on matters requiring opinion evidence. In addition, the appellant anticipates that a large number of clinical records will be required to be placed before the jury.

- [8] The appellant is concerned that a jury will not be able to understand or retain the medical evidence adequately. Her counsel points to what the chambers judge described as "some unusual features" of the appellant's damages claim, including opinion evidence of the medical reports exchanged by the parties that the appellant describes as presenting "polar opposite diagnoses and prognoses" for the appellant.
- [9] These arguments and the record upon which they are based were all before the case management judge on the application. The appellant accepts that the chambers judge gave some consideration to these issues at various points in his judgment, but says that insufficient weight was given to them when reviewed as a whole.
- [10] One issue the appellant stressed was a concern that potentially prejudicial evidence might be placed before the jury relating to the appellant's credibility. The appellant acknowledged that this evidence would be the subject of an admissibility ruling by the trial judge before it ever reached the jury. I am unable to see how this concern can assist the appellant on the application to strike the jury notice, since the ruling on admissibility will be made by the trial judge whether or not the jury notice is struck.
- [11] The case management judge reviewed these issues and expressed his confidence that "with a modest amount of supplementary explanatory assistance by the experts in their evidence-in-chief, the expert reports in the case at bar will be understood by the jury." His conclusion on this issue was as follows, at para. 29 of his judgment:

Although this is a close case, I conclude that the character of the issues in this case, considered individually or in combination with one another, do not rise to the level of being complex or intricate within the meaning of the rule.

- [12] I agree that this is a close case, but in my view the chambers judge made a decision that was open to him on the record before him. I can see no reviewable error and would not give effect to this ground of appeal.
- [13] On the second issue, the case management judge concluded that the issues would require a prolonged examination of documents and a scientific examination within the meaning of the sub-rule, but rejected the argument that the examination of these documents and expert reports could not be made conveniently with a jury.
- [14] On this appeal, the appellant has not identified an error of principle in the decision of the case management judge. Her main argument is that the judge gave no weight, or no sufficient weight, to factors relevant to the application to strike. These factors may be summarized as the length of trial, the number of expert witnesses, the number of medical fact witnesses, the liability dispute and the complexity of the expert evidence, particularly in relation to the appellant's medical condition.

[15] She points out that in *MacPherson v Czaban*, 2002 BCCA 518, a jury notice for a 20 day trial with an anticipated 15 expert witnesses was struck, while in this case a jury notice for a 19 day trial with 12 expert witnesses and 16 medical fact witnesses was not. But in my view, comparing the number of trial days or experts in different cases does not raise a question of principle justifying the intervention of this Court.

[16] A similar argument was made in *MacPherson*, and Craig, J.A. addressed it in this way at paragraph 17:

There will undoubtedly be some variation in the opinion of judges as to the capacity of a jury on particular applications but that is inherent in discretionary orders.

[17] This issue arose more recently in *Pannu*, and this Court made the following comments at para. 30:

In my opinion, while other similar cases can assist in assessing whether discretion has been exercised judicially, broad and general similarities may mask material differences. The analysis does not begin and end with adding up the number of experts and medical issues or the number of pages of documents or the length of trial. Those factors may be indicative of whether the trial may be conveniently heard with a jury, but they are not necessarily the last word.

[18] In *MacPherson*, the decision of the trial court to strike the jury notice was upheld. In *Pannu*, the decision of the trial court to confirm the jury notice was also upheld. In both cases, this Court deferred to the decision of the trial court, in the absence of error in principle, a consideration of irrelevant factors, or a failure to consider relevant factors. That is the proper standard of review in this Court for discretionary decisions.

[19] The additional factor that whether or not a trial is heard by a jury engages important issues of trial management reinforces the deference owed to judges of the trial court in exercising their discretion on an application to strike a jury notice.

[20] I note further that this case is being case managed. It is open to the case management judge or the trial judge to revisit this question closer to trial if required by the interests of justice. This point was made by Hinkson, J. (as he then was) in *Dorus v. Teck Corporation*, 2008 BCSC 1112 at paras. 23-24:

[23] The onus on this application rests upon the defendants who seek to have the plaintiffs' Notice struck, and there is nothing in the material before me that would enable me to conclude that the nature or volume of documents that will have to be examined by the trier of fact in this case are such as to meet this factor.

[24] Should the circumstances with respect to this factor become clearer at or during the trial of the action, it is still open to the Court to discharge the jury and proceed without it, should the interests of justice so require.

[21] In my view, the case management judge in the case at bar considered the factors that were relevant to the disposition of this application and did not take into account any irrelevant factors. He did not make an error of principle but rather came to a decision that was open to him. I can see no reviewable error in his judgment. I would dismiss this appeal.

[22] GROBERMAN J.A.: I agree.

[23] BENNETT J.A.: I agree.

[24] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Hunter"

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