

CANADA / JUDGMENT

Egan v. Andrychuk

2020 BCSC 2302

COURT

Supreme Court of British Columbia

DECIDED

24 January 2020

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2020 BCSC 2302 Egan v. Andrychuk IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Egan v. Andrychuk, 2020 BCSC 2302 Date: 20200124 Docket: M173182 Registry: Vancouver Between: Cody Egan Plaintiff And Teejay Peter Andrychuk and Jessie Andrychuk Defendants Before: The Honourable Madam Justice Fleming Oral Ruling Re Mistrial Application Counsel for the Plaintiff: J.L. Harbut A. Leoni Counsel for the Defendants: M.D. Wilhelmson S. Christopher Place and Date of Trial: Vancouver, B.C. January 24, 2020 Place and Date of Judgment: Vancouver, B.C. January 24, 2020

- [1] THE COURT: The plaintiff applies for a mistrial based on the cumulative effect of the defendants' closing address to the jury, and seeks an order that the jury be discharged and the trial continue as a judge alone trial, pursuant to Rule 12-6(12) of the Supreme Court Civil Rules.
- [2] At paragraph two of the plaintiff's submissions, with reference to the transcript of the closing address, he sets out and discusses ten specific submissions by the defendants that form the basis of the application, which I do not intend to recite in the interests of time.
- [3] In summary, he complains the defendants misconstrued the plain meaning of the report of Dr. Kendall, a defence expert, regarding causation; misconstrued the law by stating any ambiguity in his opinion must weigh against the plaintiff because he chose not to cross-examine him; potentially misled the jury as to the more serious aspects of his shoulder injury by emphasizing the less significant of two tears; misconstrued the legal test for causation; misconstrued the proper approach to assessing non-pecuniary damages by importing a credibility or likability component to the assessment; used highly inflammatory language when referring to the plaintiff's conduct as "doctor shopping"; unfairly quoted from portions of Dr. Regan's evidence in cross-examination, and told the jury Dr. Regan strayed into advocacy, although the suggestion was not put to him in cross-examination.
- [4] Most problematic, says the plaintiff, is the defendants' submission regarding Dr. Kendall's evidence on causation and the confusion created by the suggestion that there is ambiguity in his report, which they argued could not be resolved because the plaintiff chose not to cross-examine Dr. Kendall.

- [5] Noting the issue of causation regarding ongoing right shoulder pain is foundational, the plaintiff argues the defendants' address has the potential of "kneecapping" the entire case, describing the evidence against causation as amounting to pure speculation and both Dr. Regan and Dr. Kendall being of the view that causation has been made out. Acknowledging causation is his burden, the plaintiff argues the defendants' address casts doubt when the evidence does not support a conclusion that causation has not been proved.
- [6] The plaintiff takes the position that the defendants' most problematic submission, as well as, the cumulative effect of all of the improper submissions, cannot be adequately remedied through reply submissions and corrective instructions, bearing in mind that both may serve to magnify rather than rectify the improper submissions. In addition, I cannot properly instruct a jury to adopt a particular view of the evidence.
- [7] The defendants deny their closing address involved misconduct, but argue in any event, the transgressions complained of and their cumulative effect can be amply addressed through a corrective instruction.
- [8] The parties do not disagree about the legal principles that govern a mistrial application. There is a heavy onus on the applicant to establish that the prejudice arising from the alleged misconduct is so great that it cannot be remedied. Ultimately, the trial judge must be of the view that the comments at issue cause a substantial wrong or miscarriage of justice, making it unfair to continue the trial with the present jury. The question is whether the particular jury in the particular circumstances of the case will be able to dispel the matters of concern from their minds. It must be shown that the misconduct is likely to prejudice the jury, may affect the verdict, or might reasonably be supposed to have deprived the innocent party of a fair trial. (See: *Giang v. Clayton, et al.*, [2005] B.C.J. No. 163; *Cleeve v. Gregerson*, [2009] B.C.J. No. 13; and *Haamstra v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092).
- [9] It is recognized that in closing submissions counsel have a wide latitude to effectively advocate for their client. A closing address is argument and the object of argument is persuasion: *deAraujo v. Read*, [2004] B.C.J. No. 853. Counsel have the right to make an impassioned address that includes legitimate rhetoric. However, counsel are not permitted to express personal opinions, beliefs, or opinions regarding the merits of the case. Comments which impede the objective consideration of the evidence, or encourage an assessment based on emotion or irrelevant considerations, are objectionable.
- [10] Where the trial judge finds misconduct, a mistrial should be ordered and the jury discharged, only if she concludes that she cannot remedy the effect of the statements on the minds of the jurors. The trial judge must expect that a jury will follow her instructions or warnings and act judicially and responsibly.

- [11] I have been provided with some authorities where mistrials have been ordered on the basis of the cumulative effect of multiple transgressions. In Cleeve at para. 45, the Court of Appeal observed, however, that even where counsel has made several errors, a corrective instruction may be sufficient to prevent a substantial wrong.
- [12] Applying these legal principles, much as Justice Williams did in *Blackley v. Newland* (2 February 2012), New Westminster M121592 (B.C.S.C.), I accept that many of the submissions the plaintiff complained of are concerning, but only some amount to misconduct. I have concluded that those that involve misconduct can be remedied by additional instructions in my final charge, also bearing in mind the plaintiff's right to provide a reply address.
- [13] In my view, the submissions that amount to misconduct include the defendant's discussion of Dr. Kendall's report, both with respect to his opinion about causation and the legal submission regarding the impact of the plaintiff's decision not to cross-examine him; the submission about non-pecuniary damages and the role of credibility, and the submission regarding Mr. Benning "boosting the numbers up" with respect to his use of the Census data.
- [14] I invite submissions from counsel on correcting instructions regarding both the defendants' submissions that constitute misconduct and the others complained of, excepting the reference to Dr. Regan straying into advocacy, which I accept is not a *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.) issue, the complaint about the defendants' insertion of personal opinion, which, although close to the line, I accept was permissible advocacy, and the lengthy discussion of Dr. Kendall's second report, as well as, the submissions regarding Dr. Regan's evidence in cross-examination regarding Mr. Egan's dominant hand. In my view, these issues are best addressed by the plaintiff in reply. "Fleming J."

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Prepared on 25 October 2026 · Esheria