
CANADA / JUDGMENT

Hendricks v. Xie

2019 BCSC 1034

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1034 Hendricks v. Xie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hendricks v. Xie,

2019 BCSC 1034

Date: 20190626

Docket: M137521

Registry: Vancouver

Between:

Kandace Nicole Hendricks

Plaintiff

And

Maria Wei Xie

Defendant

Before: Master Muir

Reasons for Judgment

Counsel for the plaintiff:

M.G. Thomas

Counsel for the defendant:

A. Booth

Counsel for the defendant, John R. Buckley, in the Vancouver Registry Action M1811818:

M.G. Bolda

Place and Date of Hearing:

Vancouver, B.C.

May 31, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2019

introduction

- [1] This is an application by the defendant, Maria Wei Xie ("Ms. Xie"), for an order that this action and the Vancouver Registry Action M1811818, Myren v. Buckley (the "Buckley action"), be tried at the same time, subject to the direction of the trial judge. "Myren" is the married name of the plaintiff, Kendace Nicole Hendricks, in this action.
- [2] In addition, Ms. Xie seeks an order that the parties in this action may use documents obtained through the discovery process in the Buckley action, and the parties in the Buckley action may use documents obtained through the discovery process in this action, and for costs.
- [3] The defendant, John Robert Buckley, in the Buckley action consents to these orders on condition that they are without prejudice to his right to seek an adjournment of the trial in this action currently set to commence on September 3, 2019 for 24 days.
- [4] The plaintiff opposes the orders sought, inter alia, because having both actions heard at the same time will undoubtedly require an adjournment of the September 2019 trial.
- [5] In addition, there was another application by Ms. Xie before me for leave to bring a third party claim against Mr. Buckley but that application was adjourned for want of time.

Background

- [6] This action arises from a motor vehicle accident on December 11, 2011 (the "2011 accident").
- [7] The notice of civil claim in this action filed November 26, 2013 claims, amongst other things, aggravation of pre-existing brain injury and aggravation of pre-existing spinal injury, headaches, injury to neck and right shoulder.
- [8] The injuries alleged to have been aggravated stem from a prior accident on May 27, 2002 (the "2002 accident"). In the 2002 accident, the plaintiff suffered, amongst other things, a severe traumatic brain injury, multiple fractures to her neck, arms, back, and pelvis.

- [9] There is a mediation in this action scheduled for June 20, 2019.
- [10] As noted, the trial in this action is set to commence September 3, 2019 for 24 days by judge and jury. This is the third trial date for this action. It was originally set for three days commencing April 20, 2016, then adjourned to ten days commencing May 7, 2018. Prior to the 84-day deadline, the plaintiff served nine expert reports, including a cost of future care report claiming \$3.4 million in damages.
- [11] Ms. Booth, counsel for Ms. Xie, concluded that all injuries from the 2002 accident were being claimed again in this action and 16 expert reports produced for the 2002 accident were served on the plaintiff in this action.
- [12] At the trial management conference of March 28, 2018, the Master concluded that the ten days set for the trial were insufficient and, subsequently, the May 7, 2018 trial was adjourned and rescheduled to September 3, 2019 for 24 days.
- [13] On September 21, 2018, the plaintiff was involved in another motor vehicle accident when her vehicle collided with that of John Robert Buckley (the "Buckley accident").
- [14] On October 9, 2018, an Insurance Corporation of British Columbia ("ICBC") adjuster contacted plaintiff's counsel to ask if they would be acting for the plaintiff regarding the Buckley accident, and that was confirmed on October 22, 2018.
- [15] The notice of civil claim in the Buckley action was filed on November 9, 2018. The plaintiff claims injuries including shock and confusion, memory difficulties, soft tissue injuries to the neck and back, and exacerbation of pre-existing conditions and injuries.
- [16] The notice of civil claim in the Buckley action was served on November 13, 2018 and counsel for the plaintiff inquired if Ms. Booth, counsel for Ms. Xie, would be representing Mr. Buckley in the Buckley action. That was confirmed by ICBC on December 18, 2018.
- [17] However, on April 4, 2019, plaintiff's counsel was advised that Stewart and Company would be acting for Mr. Buckley. I was advised that this was due to a conflict having been discovered by Ms. Booth.
- [18] On April 10, 2019, Mr. Bolda of Stewart and Company advised that he was triple-booked for the presently scheduled trial dates and had yet to receive the file from his client.
- [19] The status of this action is that document disclosure has been made and examinations for discovery have been held. As noted, the motor vehicle accident was in December 2011 and this is the third trial date. Expert reports were exchanged prior to the last trial date, May 7, 2018, which I note was set in advance of the Buckley accident.
- [20] The Buckley action, according to counsel, would not be ready to proceed to trial in September 2019, even if Mr. Bolda, counsel for Mr. Buckley, was available. It appeared to be generally accepted that if the trials were ordered heard together, that an adjournment of the September 2019 trial dates would be necessary.

Position of the parties

The Defendant

- [21] The defendant in this action submits that the injuries claimed in this action and the Buckley action are clearly indivisible and are indivisible from the injuries claimed in the 2002 accident.
- [22] The defendant relied on s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which provides:

Avoidance of multiplicity of proceedings

10 In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

[Emphasis added.]

- [23] The defendant submitted, in the circumstances, that the order sought was mandatory.
- [24] In the alternative, the defendant relied on Rule 22-5(8) of the Supreme Court Civil Rules, which provides:

Consolidation

- (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.
- [25] The considerations for the exercise of that discretion were summarized in *Gulamani v. Chandra*, 2008 BCSC 179, as follows:
- [52] Based on the authorities, I must consider whether the pleadings in the two actions reveal common claims, disputes, and relationships, and if so, whether they are "so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense" (*Merritt v. Imasco Enterprises Inc.* (1992), 2. C.P.C. (3d) 275 (B.C.S.C.) at p. 282). With regard to the latter question, the authorities discussed provide a non-exhaustive list of factors to consider, namely:
- (1) whether the order sought will create a saving in pre-trial procedures, (in particular, pre-trial conferences);
 - (2) whether there will be a real reduction in the number of trial days taken up by the trials being heard at the same time;

- (3) the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest;
 - (4) whether there will there be a real saving in experts' time and witness fees;
 - (5) whether one of the actions is at a more advanced stage than the other;
 - (6) whether the order will result in a delay of the trial of one of the actions and, if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits which a combined trial might otherwise have;
 - (7) whether there is a substantial risk that separate trials will result in inconsistent findings on identical issues; and
 - (8) whether the order will likely deprive a party of their right to a jury trial.
- [26] The defendant submits that the consideration of common claims, disputes, and relationships should be done on the pleadings and that the pleadings in this action and the Buckley action are sufficiently similar that the defendant is clearly entitled to the order sought. In particular, the damages claimed from each of these accidents include an exacerbation of previous injuries. Thus, the defendant asserts there is an indivisibility of injury that must be considered in each action, complicated by the injuries from the 2002 accident.
- [27] The defendant relied on this assertion of indivisible injuries in arguing that there would be a substantial risk of inconsistent findings and, hence, potential embarrassment to the administration of justice. In this regard, the defendant relied on *Garcia v. Drinnan*, 2013 BCCA 53 and *Murray v. McIlmoyl*, 2018 BCSC 2269 in support of her position that the court should order the trials to be heard at the same time.
- [28] The defendant also argued that there would be a substantial savings of witnesses' time and experts' fees if the two actions were heard together.
- [29] As a result, the defendant submitted that there would be no serious inconvenience to parties having to attend while having only a marginal interest in parts of the proceeding.
- [30] The defendant concedes that there will be a delay in the trial and hence delay in recovery of any compensation the plaintiff might be entitled to, but argues that such prejudice must be weighed against the benefits of a combined trial.

The Plaintiff

- [31] The plaintiff relied on the opinion of the plaintiff's expert, Dr. Roy O'Shaughnessy, a psychiatrist, in this regard.
- [32] Dr. O'Shaughnessy produced an expert report for the plaintiff dated January 14, 2019, which considers the impact of the Buckley accident. He noted:

18. The motor vehicle accident of September 21, 2018 was less severe than the 2011 accident. In this incident, she was driving when a car ran a stop sign, hitting her car in the right rear. Again there was nothing to suggest any blow to the head or loss of consciousness, awareness, or memory. Police arrived at the scene. She was able to walk the two blocks to her home. She did experience some increase in shoulder and neck pain although I have not seen updated medical records documenting whether in fact there is any physical findings associated with this accident.
19. From a psychiatric perspective, Ms. Myren does tell me that she has noticed increased symptoms of depression following the latter accident ...
- [33] The plaintiff submits that she suffered cognitive issues from the 2002 accident that affected her ability to work and that chronic pain from the 2011 accident has eliminated any residual ability for her to work. Hence, there would be no possible award for wage loss or loss of future capacity in the Buckley action.
- [34] The plaintiff says that the 2011 accident caused centralized sensitization pain in her neck and headaches. The main treatment she is receiving are ketamine infusions. I am told they are very expensive and require her to be hospitalized for a period. She has been receiving these as in-patient at Change Pain, a private treater. The future care costs of these infusions are valued by the plaintiff at over \$2 million.
- [35] Although ICBC has reimbursed the plaintiff for some physiotherapy treatments, it has not paid for the majority of this ketamine infusion treatment, for which the plaintiff is out of pocket, at present, \$117,806.81.
- [36] The plaintiff points out that there is no risk that the need for these treatments could be attributed to the Buckley accident.
- [37] There were seven years between the 2011 and the Buckley accidents. The plaintiff submits that her symptoms had plateaued, her injuries had been diagnosed, and her loss was fully valued in the spring of 2018. Both parties were prepared to go to trial.
- [38] The plaintiff submits that the injuries she suffered from the Buckley accident were discrete and divisible--being depression and a minor increase in shoulder and neck pain. She submits that the Buckley action would require fewer witnesses, less expert evidence, and a significantly shorter trial.
- [39] In the circumstances, the plaintiff submits that the danger of duplication of evidence and of inconsistent findings of fact if two trials occur is minimized. She submits that to have these trials heard together will require the defendant in the Buckley action to be present for a substantial amount of evidence that will have no bearing on that action.
- [40] The plaintiff points out that this action is in a far more advanced stage than the Buckley action, as this action was ready to proceed to trial in the spring of 2018.

- [41] The plaintiff also submits that, in view of the circumstances of this case, I should not grant an adjournment. She submits that ICBC's failure to proceed expeditiously in the face of the Buckley action would necessitate an adjournment if the two actions are heard together.
- [42] Counsel for the plaintiff pointed to the decision of Master Harper in Murray as follows:
- [9] I put to both counsel the practice point as to how these types of applications can be avoided. Counsel for the defendant says it will be costly for ICBC to instruct counsel on every case where there is a second accident to apply for leave to file a third party notice. Counsel for the plaintiff says it is up to the defence to decide what to do in each individual case. In retrospect, I am sure the parties would both agree that a simple exchange of correspondence with respect to the plaintiff's intentions early on would allow the parties to assess the situation in a way that preserves a trial date. I expect that, with the development of simple protocols in this regard, these types of applications can be avoided in the future.
- [10] It was risky strategy for the defence not to apply early on for leave to file a third party notice and, yet, by the same token, it was risky strategy for the plaintiff to assume that he could proceed to trial in January 2019 with a second accident and a second claim hanging over the entire trial. In my view, again, with the benefit of hindsight, the matter could have been handled differently so that the trial could have been preserved, but it was not. I do not have the benefit of any affidavit evidence on behalf of the instructing adjuster in this case to explain why a different strategy was not pursued. It is very difficult to understand why the defendant sat back and waited for the plaintiff to sue on the second accident.
- [43] The plaintiff submitted that as the defendant in Murray had the same counsel as in this action, it behooved them to move without delay if they expected these actions to be heard together. The plaintiff pointed out that she did just that--filing a notice of civil claim less than two months after the Buckley accident and serving it immediately, but that it was not until April 10, 2019 that Mr. Bolda was appointed for the defendant and even then, he had not been provided with the file materials from ICBC.
- [44] The plaintiff submits that this litigation has gone on too long and is too expensive already. She submits that a further adjournment would be prejudicial to her in carrying the costs of past and future treatment and in requiring updated experts' reports. In addition, she points out that this case was prepared under the pre-December 31, 2019 Rules regarding experts and that adjourning this case past December 31, 2019 would be likely, and the upcoming amendments to Rule 11-8 could result in her losing the right to present the expert evidence already obtained.

Analysis

- [45] I do not accept the defendant's position that s. 10 of the Law and Equity Act obliges me to grant the order sought. A similar argument was considered by the court in *Rehmat v. Transamerica Life Canada*, 2009 BCSC 495 and rejected at para 23. In my view, the authorities are clear that the order sought is a discretionary one and the considerations for the court are as set out above in *Gulamani*.
- [46] The primary underpinning of the application by the defendant in this action is that the injuries sustained by the plaintiff in the Buckley action are so similar as to provide a presumptive right to have the matters tried at the same time.
- [47] That position, however, is not supported by the evidence. I am satisfied by the plaintiff's evidence that her injuries had plateaued and her losses quantified by the time of the second trial date in May 2018. She was unable to work at the time of the Buckley accident, hence, there can be no significant claim of loss of past or future income earning capacity in that action. The Buckley accident did not cause the need for the ketamine infusion treatment the plaintiff is receiving.
- [48] The Buckley accident appears to have been much less severe, with injuries that overlap to a minimal degree.
- [49] Thus, there will be little duplication of evidence, the risk of embarrassment due to inconsistent findings is low and, Mr. Buckley, the defendant in the Buckley action, would be seriously inconvenienced in having to sit through lengthy evidence regarding the impact of the more serious 2011 accident.
- [50] The actions are at totally different stages. This action is ready for trial, whereas the Buckley action seems unlikely to be able to be ready for the present trial dates in September 2019. I conclude that those trial dates will be lost if the order to have the two actions tried at the same time is made. I believe that would have been the case even if ICBC had proceeded more expeditiously,
- [51] The prejudice to the plaintiff if this trial is further delayed is obvious. She is unable to work. There will be treatment costs, expert fees, and the simple burden of having litigation stemming from a 2011 accident unresolved until nine or ten years later. The latter, in and of itself, is, in my view, unacceptable except in the most plain and obvious circumstances. There is a risk that the amendments to Rule 11-8 will negatively impact the plaintiff's presentation of expert evidence in this action if the September 3, 2019 trial is further adjourned. The cost of future care report of \$3.4 million in this action is indicative that proportionality would dictate that this claim should be heard without delay.

[52] There is no real prejudice to the defendant in this action if the trials are not heard at the same time. Even if the injuries are held to be indivisible, which appears unlikely, they are already prepared to bring an application to allow a third party claim and if leave is not granted, an action against Mr. Buckley could be commenced seeking contribution and indemnity.

conclusion

[53] The factors weigh heavily in favour of the plaintiff's position. Therefore, the application by the defendant in this action is denied.

[54] The plaintiff will have her costs in the cause.

"Master Muir"

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