

CANADA / JUDGMENT

Hundza v. Doe

2020 BCSC 1370

COURT

Supreme Court of British Columbia

DECIDED

22 July 2020

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2020 BCSC 1370 Hundza v. Doe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hundza v. Doe,

2020 BCSC 1370

Date: 20200722

Docket: M151941

Registry: Victoria

Between:

Douglas Hundza

Plaintiff

And:

John Doe, Jane Doe and

the Insurance Corporation of British Columbia, as nominal defendant

Defendants

- and -

Docket: M181483

Registry: Victoria

Between:

Douglas Hundza

Plaintiff

And:

Yan Li Lin and Dan Ping Ye

Defendants

Before: Master Bouck

(appearing by teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A. Wrona (by teleconference)

Counsel for the Defendant Insurance Corporation of British Columbia:

C.A. Salomon, Q.C. (by teleconference)

Counsel for the Defendants Lin and Ye:

G.A. Stratton (by teleconference)

Place and Date of Trial/Hearing:

Victoria, B.C.

July 21, 2020

Place and Date of Judgment:

Victoria, B.C.

July 22, 2020

THE COURT: As is my practice, I reserve the right to edit or otherwise improve upon these oral reasons for judgment in the event a transcript is ordered.

- [1] There are five notices of application before the court, all brought on short-notice, with respect to two personal injury actions joined for trial. Two applications are brought in Action Number 151941, (the "first action"), and the other three in Action Number 181483 (the "second action").
- [2] The plaintiff seeks orders that the 15-day trial set in both actions, and commencing on August 17, 2020, be heard by a judge alone. Alternatively, if the trial is adjourned by order of the court, the plaintiff seeks an advance of \$50,000 as a condition of that adjournment. The defendants seek to adjourn the trial date generally.

- [3] During submissions, defence counsel in the second action received instructions to offer the plaintiff a \$15,000 advance in exchange for a consent adjournment. The plaintiff declined this offer.
- [4] The defence in the second action also seeks an order for document production.
- [5] The defendants have filed jury notices in their respective actions. The Chief Justice has directed that no jury selections or trials will take place until after January 1, 2021. If the August trial proceeds, it is not necessary to address the plaintiff's relief for an order that the matters be heard by a judge alone. That will be the de facto result given the Chief Justice's directions.
- [6] The main issue to be decided by the court is whether the interests of justice favour the adjournment orders. I note parenthetically that all parties remain wedded to the idea, and indeed order, that the trials in the two actions be heard together.
- [7] By way of brief background, the plaintiff is a 37 year-old self-employed aesthetician. In the first action, Mr. Hundza alleges that he suffered injuries on February 14, 2015, while in a vehicle stationary in a drive-through restaurant lineup, which was struck from behind by an unknown driver. The injuries pled in that action are headaches, memory loss, jaw pain, and knee pain. Liability for this accident is denied by the defendant ICBC.
- [8] In the second action, the plaintiff alleges that he suffered emotional insult, injury to the brain, jaw, neck, hip, and right knee pain, as well as aggravations of existing injuries due to a rear-end motor vehicle accident that occurred on May 13, 2016. The defendants in the second action deny liability for this accident.
- [9] Causation for the plaintiff's injuries and losses is put in issue by the defendants in the actions.
- [10] The August trial date will be the first secured for the hearing of both actions. The date was set by way of a notice of trial filed March 11, 2019.
- [11] Mr. Hundza was examined for discovery in the first action on February 5, 2016, and May 1, 2018, and in the second action on April 17, 2020.
- [12] The 84 day deadline for the service of expert reports was May 22, 2020. By that date, the plaintiff had served counsel in the first action with reports from a psychiatrist, a physiatrist, a GP, an occupational therapist, and an economist. Meanwhile, the plaintiff had reached an agreement with the defendants in the second action that Rule 11-6 deadlines would be extended due to the unexpected consequences of the COVID-19 pandemic. Those parties agreed that the expert report deadline would be extended to June 30, 2020, with rebuttal reports due by July 23, 2020. This extension allowed the plaintiff to attend an FCE at the request of the defence. The defence argues that the plaintiff's actions alone are responsible for the extension.

- [13] The plaintiff was hampered in his efforts to obtain additional medical-legal reports due to COVID-19 office closures. On June 23, 2020, the plaintiff served defence counsel in the second action with all of the reports that had been earlier delivered in the first action, as well as a supplemental report from a physiatrist. The same supplemental report was served on defence counsel on June 25, 2020.
- [14] In her cover letter, plaintiff's counsel acknowledges that the supplemental report is served late "due to COVID", and offers to extend the deadline for any rebuttal opinions. That invitation was not accepted.
- [15] Finally, on July 2, 2020, plaintiff's counsel served a report from a neurologist, Dr. Cameron. Dr. Cameron opines that the plaintiff's ongoing disability is due to a combination of ongoing cognitive problems, psychological problems, and chronic pain that were cumulative from the first and second accidents. At least that is the description of the opinion in the defence's application, as the actual report does not appear to be in evidence here. Again, an offer to extend the time for rebuttal reports was made by plaintiff's counsel and not accepted.
- [16] Meanwhile, the defence FCE was further delayed at the plaintiff's request with an assessment not taking place until July 4, 2020. The FCE report was issued on July 14, 2020. Plaintiff's counsel does not object to the late delivery of the report.
- [17] In addition, the defendants in both actions will rely on reports from a psychiatrist and a physiatrist. Neither of these opinions are addressed in any detail in the evidence on this application.
- [18] The defendants say that they have been unable to properly instruct an economist due to the plaintiff's dilatoriness in providing document disclosure. In particular, the defendants say that they need income tax returns and other business records.
- [19] If the trial proceeds in August, the defendants say that they will be collectively prejudiced for two main reasons. First, the defendants say that there is no ability to respond to the late-served opinion evidence. Defence counsel in the first action also submits that Dr. Cameron's opinion makes rebuttal reports from a neurologist and a pharmacologist necessary, and that such evidence will not be ready in time for trial. The plaintiff notes the lack of affidavit evidence addressing efforts made to secure these responsive opinions.
- [20] Second, the defendants say that despite repeated demands over the course of the last year or so, the plaintiff has failed to provide full document disclosure so as to allow the defence to properly instruct their experts, including an economic expert. The plaintiff says that he has provided all of the material or relevant financial documents in his possession or control. The plaintiff has not filed personal or corporate income tax returns for many years and is unable to pay an accountant to do so. Defence counsel in the second action was advised of this fact in January 2020.

- [21] In addition, the defence argues that credibility and causation issues support a jury hearing the actions and thus the trial dates should be adjourned until after the COVID-19 suspension of jury trials is lifted.
- [22] I was advised that Ms. Salomon has only very recently assumed conduct of the defence in the first action, but this change of counsel was not proffered as a basis for the trial's adjournment.
- [23] The defendant in the second action seeks production of third party records from MSP, Pharmanet, and cognitive behavioural therapy skills group ("CBT"). Plaintiff's counsel says that she has earlier requested records from MSP and Pharmanet with no response received, and the CBT records already disclosed are current to May 2020 with no additional records in existence. Defence counsel say that the third parties have been served with the application and take no position on the order sought.
- [24] None of the parties provided concrete evidence as to when this trial in the actions might be heard if the adjournment is granted. The defence suggests that the trial might be heard in early 2021, but this suggestion is entirely speculative. The plaintiff suggests that the delay may be until 2022. The plaintiff has deposed in his affidavit as to the necessity of closure on these proceedings, together with financial losses he has suffered to date that may only further accrue if an adjournment is granted.
- [25] The parties attended a TMC for both actions on July 7, 2020. Master Keim made a series of orders intended no doubt to ensure that the parties were ready for the August trial. For example, the TMC order requires the defendants to identify which documents they intend to rely on at trial by July 30, 2020, and identify specific objections to expert reports by July 31, 2020.
- [26] The parties' applications are intertwined in that the document production application influences the adjournment request. I will first deal with the document production application.
- [27] As indicated to counsel at the conclusion of submissions yesterday, I know of no authority that requires a party to create a document. A master's jurisdiction with respect to document production orders is derived solely from Rule 7-1. Under that authority, I am not prepared to make any of the orders sought in paragraph 1 of the defendant's notice of application. First, I have not been persuaded that various documents exist or can be compelled by the court to come into existence. Second, the plaintiff has provided evidence that other documents have been in fact produced to the defence.
- [28] I will make an order that the MSP, Pharmanet, and CBT records be produced as per the terms in paragraphs 2, 3, and 4 under Part 1 of the application. I decline to make that order in Halliday form, as the evidence said to support such terms is not specific to this plaintiff: *Gorse v. Straker*, 2010 BCSC 119.

- [29] As to the defence applications to adjourn the trial dates, I have considered the law as set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173, and in particular the passages at paragraphs 18 to 26. The interests of the plaintiff in proceeding to trial and those of the defendant in allowing for an opportunity to further meet the plaintiff's case are, at first blush, evenly balanced. The adjournment would not be granted if the defendants were relying on the alleged dilatory document production by the plaintiff. The court has been functioning for several months now, including allowing for written submissions and urgent hearings, so an application for document production could have proceeded well before now.
- [30] I am alive to the law that states that counsel's dilatoriness in proceeding with trial preparation can be a reason for an adjournment, but again that is not the basis for the request made on this application. Similarly, I observe that no party should expect a presider at a TMC to grant substantive relief on a contested matter where evidence is required.
- [31] In any event, I am satisfied that a fair trial can be heard based on the document production provided to date and as ordered today.
- [32] As for the inability to instruct an economist, the fact is that the documents on which the opinion is supposed to be premised on do not exist. At trial, the defence can cross-examine the plaintiff's experts and indeed ask the court to draw adverse inferences about the plaintiff's income loss due to these absent documents.
- [33] I am not persuaded that an adjournment is necessary so that the defence can obtain expert opinions from either a neurologist and/or pharmacologist. The evidence with respect to the necessity of either opinion is frail. Yes, Dr. Cameron may opine that the first action is connected to the plaintiff having some cognitive dysfunction, but the evidence does not address why a rebuttal report on this issue is necessary. A brain injury is not pled in the first action, the plaintiff has made admissions at his examination for discovery that cognitive dysfunction arose after the second accident, and the defence already has an opinion on the plaintiff's mental condition.
- [34] Similarly, the evidence said to support a pharmacological expert opinion is scant. The defence's evidence merely states that there is new information about the type of medications taken by the plaintiff. Counsel submits that this new evidence invites further investigations, including another expert opinion. I am unable to conclude on the evidence and that statement that such an opinion is necessary for a fair trial on the merits of the plaintiff's claim.
- [35] I also echo the submissions of plaintiff's counsel that even if there was some need for responding opinions, the evidence should have addressed the steps taken to obtain that rebuttal opinion and whether it would be ready in time for trial. A bald statement that there "is not enough time" to obtain such opinions is not helpful and suggests that the presider can take judicial notice of the availability of certain types of experts and their personal timelines for assessments and reports.

- [36] That leaves the possible prejudice to the defence of denying their entitlement to a jury as the trier of fact. I have considered the decision of *Cheung v Dhaliwal*, 2020 BCSC 911, as well as that of *Ellison v Abgrall* 2020 BCSC 1063. As with those cases, the specific and general prejudice to the plaintiff in delaying the adjudication of the claims here outweighs the possible tactical advantage that the defence may enjoy in a jury trial. Again, based on the evidence before me, I find that there can be a fair trial on the merits if these claims are heard at trial by a judge alone.
- [37] Accordingly, but for the issue of costs, the application by the defendants for an adjournment of the August 17, 2020, trial dates is dismissed. It follows that the relief in the plaintiff's application is unnecessary and that application is also dismissed but for costs.
- [38] Before hearing submissions on costs, I will make one further comment. At the risk of stating the obvious, the orders pronounced today are based on the current state of affairs between the parties. It may be, for example, that the third parties are unable to deliver records in time for trial. I am unable to make such a finding one way or the other at this point in time. However, if the delivery is delayed such that the records are not in possession of the defence before the trial commences, an adjournment of the trial may be necessary.
- [39] I am not seized of any further application and of course these comments do not in any way bind a future presider, including the trial judge.
- [40] I will now hear submissions on costs.
- [SUBMISSIONS ON COSTS AT 9:41:32 TO 9:43:57 A.M.]
- [41] THE COURT: These are challenging times and I appreciate that the Rules governing costs have not been changed to address these challenges. My view is that an order should go for costs in the cause on all of the applications.

"Master Bouck"

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