
CANADA / JUDGMENT

Jackson v. Yusishen

2013 BCSC 1982

COURT

Supreme Court of British Columbia

DECIDED

31 October 2013

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2013 BCSC 1982 Jackson v. Yusishen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jackson v. Yusishen,

2013 BCSC 1982

Date: 20131031

Docket: 92117

Registry: Kelowna

Between:

Francis Scott Jackson

Plaintiff

And

Mark Yusishen

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:

L. Turner

Counsel for the Defendant:

J.A. Hemmerling

Place and Date of Trial/Hearing:

Kelowna, B.C.

September 18, 2013

Place and Date of Judgment:

Kelowna, B.C.

October 31, 2013

Introduction

[1] This is an application to strike a jury notice. The plaintiff maintains that owing to its complexity the case is not suitable to be heard by a jury. The defendant disagrees.

The Law

[2] A party has a presumptive right to trial by jury and should not be deprived of that right absent good reason to do so: *Cliff v. Dahl*, 2012 BCSC 276.

[3] When it assesses a motion to strike a jury notice, the court should bear in mind that a jury must be assumed to be as capable as a judge acting alone. As McKenzie J. wrote in *MacKinnon v. Ebner*, [1997] B.C.J. No. 364 (S.C.):

[24] A reasonably informed and intelligent jury is as capable of assessing expert evidence as is a single judge. It is up to counsel to ensure it is presented so that a jury can understand it. Indeed, the very purpose of expert evidence is to assist lay people to understand technical evidence

[4] The authority to strike a jury notice is found at Rule 12-6(5):

(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).

- [5] Only Rule 12-6(5)(a)(i) and (ii) have application to the present motion.
- [6] Subparagraph (i) of the Rule contemplates a "prolonged examination of documents" or a "scientific or local investigation" that cannot be made "conveniently with a jury".
- [7] While a given trial may involve a large number of documents, it is not always necessary for the trier of fact to examine each and every one of them. Whether a "prolonged examination of documents" will be necessary will not be determined by a page count, but rather by the content of the documents and whether the issues in the trial will require the jury to pour over the content in detail: see *Wipfli v. Britten*, [1982] 32 B.C.L.R. 343 (S.C.).
- [8] The "local investigation" element of subparagraph (i) has no application here.
- [9] In the context of a personal injury case, a conflict of expert medical opinion will require the jury to engage in a "scientific investigation" within the meaning of the rule: *Sadowick v. Doobay*, [1982] B.C.J. 447 (S.C.) at para. 12.
- [10] What is "convenient" was discussed by McEachern C.J. (as he then was) in *Wipfli supra*:
- [26] Convenience, in the sense in which that word is used in the Rule, does not depend solely upon whether or not the jury can be made to understand the evidence....What is required before it is convenient to have a scientific investigation made with a jury is the ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.
- [11] Whether the character of the issues before the jury will be intricate or complex as subparagraph (ii) describes is a matter for a common sense assessment of the problems that will be put to the jury at the end of the trial. For example, in the case of *Campbell v. McDougall*, 2011 BCSC 1864, the outcome of the plaintiff's claim relied heavily upon the validity of certain test scores administered to the plaintiff by a variety of experts on a number of occasions over a number of years. The plaintiff was a person whose educational and professional background could reasonably lead to a suspicion that she manipulated those scores. The court struck the jury notice in that case in part because a proper analysis of those scores would be a complex and intricate process.

Nature of the Case

- [12] Here, the plaintiff's claim arises out of a rear-end motor vehicle accident that happened in November 2009. Both parties were driving large trucks. The impact on the plaintiff's vehicle was to a heavy and rigid hitch structure. The hitch was not damaged in the accident. The impact on the defendant's truck was to its metal front bumper. That bumper was dented by the impact.

- [13] The plaintiff asserts that shortly after the collision, he felt pain on the right side of his chest and back. He says that he continued to feel that pain for several months. Then, approximately six months after the collision, the plaintiff says that he coughed and the pain in his chest and back suddenly increased in intensity. The plaintiff has gone on to be diagnosed as having one or two fractured ribs and as having suffered hernias of the intercostal area and of the diaphragm. He has undergone several surgeries to correct the hernias. The plaintiff maintains that the surgeries have not been successful and that he is now disabled from his usual occupation as a self-employed landscaper.
- [14] In support of his position, the plaintiff will adduce evidence from his surgeon and from a radiologist. On the critical issue of causation, the plaintiff expects those witnesses to say that the radiographs that were taken in the approximately year after the collision were not of the type that would have clearly shown the presences of rib fractures. They are expected to tell the trier of fact that these negative films do not rule out the possibility that the plaintiff's ribs were fractured in the accident. They will go on to say that the plaintiff's complaints after the accident are consistent with rib injury and that the coughing episode several months later triggered the cascade of medical problems that have led to the plaintiff's current problems.
- [15] The plaintiff will also adduce evidence from several other of the plaintiff's medical treaters, a vocational expert, an occupational therapist, and an economist.
- [16] The defence will argue that the accident probably did not fracture the plaintiff's ribs. To support that proposition, the defence will rely largely on expert evidence from an accident reconstruction engineer and a radiologist. The defence wishes to cross-examine the plaintiff's quantum witnesses, but for the most part, the defence will not adduce contrary expert evidence on the quantum issue. More particularly, the defence will not adduce expert evidence on the issues of functional capacity, physiotherapy, or vocational counseling.
- [17] The engineering report upon which the defence will rely is not an easy read. Its author has employed dense language and the report is full of references to studies concerning the injury potential of various incidents. These reference studies were largely carried out by other institutions. Some of the studies are quite dated and others may have limited value in the assessment of the present case. The essence of the report is, however, easy to grasp and it is this: the collision between the parties' vehicles caused the plaintiff's body to experience a minor change of velocity. No significant injuries were found to have occurred in tests of real persons and crash test dummies which have undergone similar changes of velocity. The defence will invite the trier of fact to infer from this evidence that the accident probably did not cause an injury to the plaintiff.
- [18] The defendant's radiologist is expected to tell the trier of fact that if the plaintiff's ribs had been broken in November 2009, then callus would have formed at the site of the fractures and that callus would have been seen on subsequent radiographs. The radiologist is expected to tell the trier of fact that the callus that does appear on the films is not consistent with fractures around the time of the accident but rather with fractures having happened

somewhat later in time. The defence will ask the trier of fact to infer from that evidence that the plaintiff's ribs were probably broken in the accident.

- [19] The parties expect the trial to consume approximately three weeks of sitting time. In all, 26 witnesses will be called, 14 of whom will be expert witnesses. The only serious contest between expert witnesses is likely to be confined to the competing opinions of the radiologists.

Discussion

- [20] This application requires the court to put itself in the collective shoes of a hypothetical jury and to consider whether, firstly, the issues that will be put to the jury will require it to engage in a prolonged examination of documents or conduct a scientific investigation, such that the jury will not be able to carry out its function conveniently; and, secondly, whether the issues will be of an intricate or complex character.
- [21] A key issue that the jury will have to work out is whether the plaintiff's ribs were injured in the collision. To answer that question, the jury will have to assess the plaintiff's credibility concerning his post-accident complaints. That is a task to which a jury is most eminently suited. The jury will also have to assess the competing opinions of the radiologists. On the evidence before me, the contest between those experts will likely center on the significance of the presence or absence of callus at the site of the rib fractures and on whether the radiographs taken from time to time could have identified rib fractures. This task will involve a relatively narrow inquiry. Juries are often asked to assess expert medical opinion. The jury's task on this issue will not, I think, overwhelm their abilities.
- [22] I predict that the most troublesome piece of evidence that will go before the jury on the causation issue will be the engineer's report. While that report could have been written in a less turgid style, its content is not difficult to work out. In my opinion, this report would not overly tax the intellectual resources of an intelligent and properly instructed jury.
- [23] It is possible that the jury may find that the accident weakened the plaintiff's ribs such that the later coughing episode caused them to fracture. In that event, the standard language of an Athey instruction will suffice to guide the jury's deliberations. Again, juries are regularly instructed on similar Athey issues - this case would not present any greater complication on that issue than any other.
- [24] Once the jury has determined whether the accident caused rib fractures or a weakening of the ribs that later turned into fractures, the rest of the jury's duties will be relatively straight forward. If their answer to that question is yes, then they will have to assess the degree to which the injuries have impaired the plaintiff's function and award damages accordingly. For that task, they will have the assistance of expert reports of the type that are conventionally adduced in personal injury cases. Those reports include a functional capacity evaluation, a vocational assessment, a cost of future care report, and an economist's assessment of the present value of various loss scenarios. Again, in serious

personal injury cases, juries are routinely asked to consider such reports. There is nothing about the content of the reports in this case that suggest that a jury would not be able to conveniently consider their content and render a verdict accordingly.

- [25] If the jury's answer to the causation question is no, then their task will become very nearly trivial.
- [26] Although there are a number of expert reports that will go into evidence in this case, the reality is that the jury will likely not be required to scour each and every word in each and every report. For example, the plaintiff's economist's reports may be useful to the jury should it wish to award future losses to the plaintiff, but it is unlikely that the jury will need to go beyond picking what appears to it to be the appropriate multiplier for a given loss and a given set of positive and negative contingencies.
- [27] In my opinion, the jury's task of hearing, examining, and considering the evidence in this case will not exceed the bounds of convenience. The jury will be asked to conduct a scientific inquiry into what the radiographs could and did show of the plaintiff's rib structure, but that will be a relatively narrow and focused inquiry. The jury will be guided by the opinions of qualified medical practitioners and by counsel's submissions. It is not every contest of medical opinion that will disqualify a jury from trying a personal injury claim, and in my view, the scientific inquiry that the jury will make on this issue will be within its capacity.
- [28] Once the jury gets past the issue of causation, this case will become a relatively straightforward assessment of personal injury damages. The evidence on quantum issues is entirely conventional and is of the sort that juries are often asked to consider and assess. The jury may have to make some difficult decisions, but the path to those decisions will not, in my view, be so intricate or complex as to overwhelm the jury's capacity to arrive at a just and proper judgment.
- [29] For these reasons, I have concluded that the plaintiff's application to strike the jury notice must be dismissed.

"P.J. Rogers, J."

The Honourable Mr. Justice P.J. Rogers

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