

CANADA / JUDGMENT

Lal v. Anderson

2023 BCSC 2038

COURT

Supreme Court of British Columbia

DECIDED

5 October 2023

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2023 BCSC 2038 Lal v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lal v. Anderson,

2023 BCSC 2038

Date: 20231005

Docket: S197219

Registry: Vancouver

Between:

Brennan Robert Lal,

by his Litigation Guardian Jaclyn Bujak

Plaintiff

And:

Dr. Robert Anderson, Dr. Barry M. Bagdan, Dr. Mark Kovacs, Dr. Michael Milgrom, Dr. George Vrabec, Dr. Del Vaccaro Anaes, Providence Health Care operating a public hospital under the name St. Paul's Hospital, Vera Roberts, RN, N. Robinson, RN, K. Lawson, RN, Lillian Tse, RN, D. Caron, RN, K. Pong, RN, Drs. John Doe and/or Jane Doe #1 and #2 and John Doe, RN and/or Jane Doe, RN #1 and #2

Defendants

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D.J. Renaud

Counsel for the Defendants Dr. Robert Anderson, Dr. Berry M. Bagdan, Dr. Mark Kovacs, Dr. Michael Milgrom, and Dr. George Vrabec:

D.W. Pilley

Counsel for the Defendants D. Caron, K. Pong, Vera Roberts, and Providence Health Care:

D.S. Hwang

No other appearances

Place and Date of Hearing:

Port Coquitlam, B.C.

October 3, 2023

Place and Date of Judgment:

Port Coquitlam, B.C.

October 5, 2023

- [1] THE COURT: The applications before the Court are made by the two separate sets of defendants in this medical negligence case to strike the jury notice filed by the plaintiff. A 20-day trial is scheduled to commence November 20, 2023. As such, there is some urgency in giving these reasons. Accordingly, when I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

Background

- [2] The subject matter of this action involves a medical negligence action arising from the traumatic birth of the plaintiff on November 10, 1997, at St. Paul's Hospital.
- [3] The plaintiff was born with a brain injury as a result of which he suffers from, among other things, cerebral palsy, seizures, delayed growth, and hypoxic ischemic encephalopathy, all of which have severely affected his speech, cognition, gait, and balance.
- [4] The defendants are the hospital and the various physicians and nurses who provided care before, during, and after the birth. However, claims against many of these parties have been, or are about to be, discontinued by consent. I am advised that the defendants against whom claims will continue to be advanced are the obstetrician who delivered the plaintiff and Providence Health Care as operator of St. Paul's Hospital, by virtue of its alleged vicarious liability for the actions of the treating nursing staff.

- [5] At the time of his birth, the plaintiff's mother was 20 years old and suffered from gestational diabetes, which required insulin intervention starting at 37 weeks. At 40 weeks, she attended at St. Paul's Hospital where she was admitted and, after some time, delivered the plaintiff by spontaneous birth, although after being administered oxytocin to augment labour.
- [6] An electronic fetal monitor device ("EFM") was applied to the mother while in hospital. The paper printout, or strip, which is generated by the EFM will be a central piece of evidence at trial, as it provides clinical data as to the events as they transpires. In particular, it provides a continuing record of data such as the fetal heart rate and other readings surrounding and during the plaintiff's birth, with the original paper strip being annotated from time to time by the treating medical professionals.
- [7] It is expected that the experts will be interpreting and explaining the information as displayed on the EFM strips, as well as continued in the clinical records in which the various practitioners recorded relevant data such as blood samples, test results, their findings, and treatment given.
- [8] The specific particulars of negligence being claimed are extensive. As against the hospital, they include:
- a) Failing to properly investigate, assess, and/or evaluate the medical history of the plaintiff's mother;
 - b) Failure to obtain any and/or appropriate history, including but not limited to acquisition and or review and/or consideration of records of the plaintiff's mother;
 - c) Failure to conduct proper and/or physical examinations of the plaintiff's mother;
 - d) Failure to read fetal heart tracing strips and/or diagnostic, ultrasonic reports and/or take appropriate and/or timely action in response thereto;
 - e) Failing to manage and/or conduct fetal blood gas testing and/or obtain timely results;
 - f) Failing to properly anticipate and/or assess and/or diagnose fetal distress and/or take appropriate and/or timely action in response thereto;
 - g) Failing to adequately conduct and/or monitor maternal fetal conditions during labour and delivery;
 - h) Failing to alert Allied Health professionals and/or physicians of fetal distress in a timely fashion;
 - i) Failing to arrange for and/or provide for timely care;
 - j) Failing to provide proper facilities and adequate staffing for the purpose of providing appropriate and proper care/delivery of the infant plaintiff;

- k) Failing to have adequate medical systems in place to ensure that medical examinations were conducted with proper care;
 - l) Failing to have appropriate policy and/or procedures to offer safe delivery of an infant under the circumstances as presented by the plaintiff's mother;
 - m) Failing to ensure training, supervision, and management of the safe delivery of an infant under the circumstances as presented by the plaintiff's mother;
 - n) Failing to design, review, updated implement, and/or communicate appropriate protocols for management of labour and delivery; and
 - o) Failing to have in place a system to ensure effective communication among health professions and/or failing to maintain such is a system.
- [9] With respect to the defendant physicians, the allegations include:
- a) Failing to evaluate risk factors properly and/or at all in view of the plaintiff's mother's history and physical presentation;
 - b) Failing to establish a proper and/or any management plan for risks presented by the plaintiff's mother's pregnancy and/or failing to alter such management plan when and/or as appropriate;
 - c) Failing to properly advise the plaintiff's mother of the risks and/or options and/or potential consequences of vaginal delivery while pregnant with an infant such as the infant plaintiff;
 - d) Failing to conduct adequate maternal/fetal assessments;
 - e) Failing to adequately monitor maternal/fetal conditions;
 - f) Failure to properly advise the plaintiff's mother of the risks and/or options and/or potential consequences of vaginal delivery while pregnant with an infant such as the infant plaintiff;
 - g) Failure to order and/or prepare for and/or conduct operative delivery in a timely fashion or at all;
 - h) Undertaking a vaginal delivery when contraindicated and/or without first discerning availability and/or ordering preparation for an immediate operative delivery, including but not limited to delivery by Caesarean section;
 - i) Failure to alert Allied Health professions and/or physicians of fetal distress during labour and delivery; and
 - j) Failure to recognize high-risk factors and/or take appropriate and/or timely actions in response thereto.

- [10] At present, there are 31 expert reports with further reply reports being anticipated. The EFM and the relevant clinical records have been exchanged and were available to the experts in reaching their opinions in these 31 expert reports.
- [11] As the reports illustrated, the experts have various conflicting opinions, including as to liability, causation, the interpretation of the fetal heart tracing on the EFM, causation of the brain injuries, and effect of and/or standard required in respect of the various actions taken throughout the treatment.
- [12] For example, the plaintiff's neonatology expert opines that had the plaintiff been delivered earlier "before the hypoxia he experienced caused the acidosis that led to hypoxic brain damage," he would not have suffered the neurodevelopmental delay or spastic diplegia that he suffers. The neurologist retained by the plaintiff opines that a combination of antenatal factors and perinatal factors generated the brain damage and caused the cerebral palsy. There are other experts for the plaintiff that opine on the effects of post-birth complications, including hypoglycemia.
- [13] In contrast, defendant's theory is that the brain injury occurred prior to the plaintiff's mother presenting to the hospital and prior to 37 weeks gestation, likely in the late second or early third trimester. The potential causes for the injuries suffered as put forward by the defendant's experts include, but are not limited to, cord compression, low platelet counts, genetics, and placenta defects. The defendants' experts have opined as to multiple potential causes for these injuries.
- [14] The defendants argue that there are a number of complicated and highly scientific concepts which require knowledge of not only the medical opinions, but supporting literature being referred to and relied upon by the experts that will need to be understood by the trier of fact, including, for example, the following:
- a) Abnormal triple screen test results;
 - b) Information (the variability and decelerations) provided by the fetal heart tracings;
 - c) Lack of sentinel event during labour;
 - d) The duration of a resuscitation following birth;
 - e) The significance of the results of the arterial and venous cord gases;
 - f) Metabolic acidosis and respiratory acidosis;
 - g) The presence of nucleated red blood cells at four hours of life;
 - h) Apgar scores;
 - i) The presence of thick stale meconium on artificial rupture of membranes;
 - j) The presence of subependymal cysts on the head ultrasound done at day four of life;

- k) The significance of the thin, gritty, and unhealthy placenta;
 - l) Low birthrate;
 - m) The plaintiff's neonatal course at the hospital following delivery (i.e., tone, low blood sugars, lack of ease yours, et cetera);
 - n) The findings of head CT scan done at 13 months of age showing periventricular leukomalacia;
 - o) The pattern of brain injury expected in a term baby affected by hypoxia/ischemia; and
 - p) Possible gene mutations which would have been apparent had the plaintiff undergone exome or genome sequencing.
- [15] As to damages, the defendants argue that notwithstanding that the plaintiff's condition is now stable, there is also a disparity between the expert opinions as to the level of care and cost for that care, which will involve significant review of documents given that the time period spans some 26 years since the plaintiff was born. I am advised, although was not taken to the specific reports themselves, that the economic experts between the two different sides give a range of damages from somewhere under \$1 million to over \$16 million.
- [16] Based on the recent trial briefs, there will be 35 witnesses, 27 of which are experts.

Legal Framework

- [17] The applications are brought pursuant to R. 12-6(5)(a) of the Supreme Court Civil Rules:

Court may refuse jury trial

- (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 ...
- [18] The defendants rely on subrules (1) and (2). As such, I will not address the proportionality considerations as set out in subrule (3) for the purpose of this application.

- [19] The starting point to any analysis of an application under R. 12-6(5)(a) is to consider the following principles:
- a) Every party has a fundamental right to have a civil trial by jury, a right that is deeply rooted in our legal history and traditions and one that ought not be taken away without cogent reasons; *Han v. Cho*, 2008 BCSC 1192, at para. 12.
 - b) As a result of the presumptive right to a civil jury trial, the threshold that the applicant must meet to satisfy is a high one. They must establish "clearly" that one or more of the exceptions exist; *Han v. Cho*, 2008 BCSC 1192, at para. 13, citing *Nichols v. Gray*, 1978, 9 B.C.L.R. 5, BCCA; and *MacPherson v. Czaban*, 2002, 5 B.C.L.R. (4th) 258.
 - c) The onus to establish that the matter falls within R. 12-6(5) is on the party seeking to have the jury notice set aside. *Han* at para. 15.
- [20] Finally, to briefly comment on the timing requirements as set out in the rule, it is an accepted, and usual and sensible practice, to file the application to strike within the seven days of receipt of the notice of trial but defer the hearing until closer to trial so as to enable the parties to complete discoveries and exchange expert reports before the court decides the issue: *Bartram v. GlaxoSmithKline Inc.*, 2016 BCSC 1409, at para. 6. That is the practice that was followed with this application and, in fact, the plaintiff relies on the transcripts from the defendant's discovery at this application. No party took any issue with respect to the timing of this application.
- [21] The court must first determine if significant documentary or scientific investigation is required. Once that is established, as noted in *Wipfli v. Britten*, 1981 CanLII 615 (BC SC), at paras. 23 and 26, the court must determine whether the factual determinations based upon that technical evidence can be "conveniently" made with a jury present.
- [22] The court in *Wipfli* provided some analysis as to what "conveniently" means for the purpose of this rule:
- [23] 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. I accept the evidence of Drs. Riddell and Henniger, whose useful evidence on their cross-examinations satisfies me that they can probably make an understandable description of the actual surgical procedures and they can explain the present condition of the infant plaintiff. But that is not the point. 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.
- [23] At para. 36 of *Rados v. Pannu*, 2015 BCSC 453, the court adopted this description of "convenience". Before doing so, however, the court confirmed that there is a two-step analysis to be undertaken with the first step being whether the case required a prolonged

examination of the documents, scientific investigation, or is otherwise an intricate and complex matter, and specifically noted that lengthy documents do not necessarily mean that prolonged examination is required or that they are intricate or complex. Rather, the complexity is to be considered cumulatively with the whole of the trial in mind, with the court of appeal referencing *MacDonald v. Smith*, 1983 CanLII 580 (BC SC) in that respect. As an example, the court noted that a matter may be complex if the trial judge would experience difficulty in framing the questions for the jury.

[24] If the court does find that the first step is answered in the affirmative, the second part of the test is whether or not the examination as noted "cannot be made conveniently with a jury."

[25] Relying on that holistic or cumulative approach to the evidence, the defendants referred to *Sidhu v. Hiebert*, 2020 BCSC 183, where at para. 63, the court set out the factors to be considered specifically in determining whether or not a matter is conveniently determined by a jury in medical negligence cases as follows:

- a) The anticipated length of the trial;
- b) The number of experts to be called;
- c) The volume of expert evidence;
- d) The nature and character of the expert evidence;
- e) The extent to which there are conflicts in the expert evidence;
- f) The nature of the inquiries the trier of fact will be asked to make to resolve those conflicts, including by having regard to scientific literature;
- g) The extent to which the case necessarily involves reference to unfamiliar medical terminology;
- h) The number of issues to be resolved by the jury;
- i) The character of those issues; and
- j) Complexities that may arise as a consequence of the interaction between the issues.

[26] In *Steinebach v. Fraser Health Authority*, 2009 BCSC 1577, at para. 23, the court put it this way:

[23] It is neither reasonable nor practicable to expect a jury to determine a series of challenging issues based on weeks of complex oral testimony, much of it expert evidence, and voluminous written expert reports. The case authorities note the challenges to a jury of retaining through a lengthy trial its understanding and impression of the evidence. The realities of the single and usually continuous process of deliberation would, in a case such as this, increase the challenges and would, in my view, place an unreasonable burden on the members of the public who serve.

- [27] As to how those factors are to be applied, the defendants relied upon various decisions, some unreported, which they argue are similar to the case at bar in that they involved allegations of medical negligence during birth, where the jury notice was, in fact, struck. Specifically:
- a) *Forbes v. Fraser Health Authority* (February 29, 2008), Vancouver S063715 (BCSC)). In a factually similar case, the court noted at para. 15 that there were expected conflicts in the evidence, specifically with respect to the interpretation of the fetal heart rate. Similar to the case here, there were 30 experts who had prepared opinions, with no agreement as to causation.
 - b) *Bromse v. Savelin* (April 13, 2006), Vancouver S024711 (BCSC), at parag. 8, the court noted that the issues "may be presented in an understandable way, but once dealt with on cross-examination, they can become complicated."
 - c) *Maki v. Abrahams* (January 8, 1996) Victoria 932450 (BCSC). At paras. 35 to 37, the court referred to *Wipfli*, noting that it was necessary that the jury be able to retain its understanding of the various aspects of the evidence, not just understand it. The court was concerned that while a jury may be able to follow the evidence, they would not be able to retain it and analysis it sufficiently throughout a lengthy trial and the deliberation process.
 - d) *Brain v. Craven*, 2004 BCSC 67. The court emphasized the conflicts in the expert opinion as to causation and assessed damages in a medical negligence case which the plaintiff argues are similar considerations in this matter.
 - e) *Ediger v. Johnston*, 2006 BCSC 1997. At para. 9 the court summarized the issues raised by the defendants seeking to strike the jury, which largely mirror the arguments of the defendants here. The court concluded that despite the ability of counsel to frame their charge to the jury in a competent and effective manner, the jury may not be able to understand it giving the conflicting evidence, and retain it sufficiently throughout the length of the trial and into deliberation.
- [28] The plaintiff argues that it raises some suspicion when the defendant seeks to strike a jury notice when it is the plaintiff who carries the burden at trial and will not discharge that burden if the jury is confused. This was commented upon in *Forde v. Royal Inland Hospital*, 2009 BCSC 254, at para. 15.
- [29] In addition, the plaintiff argued that the court should be cautious in relying upon *Wipfli*, and the line of authorities that immediately followed it, without also considering what the plaintiff described as the "modern" view of capabilities of our juries.
- [30] Specifically, as noted in *Howe v. Hwang*, 2018 BCSC 90, at para. 27, the court, citing *Cahoon v. Brideaux*, 2010 BCCA 228 confirmed the view that:

... There may have been a time when a paternalistic approach to unsophisticated jurors was justified. That time is now past and modern jurors represent a well-educated, well-informed and experienced cross-section of our society.

[31] In *Howe*, the court went further to consider *Forde* and other cases under this modern view and found at para. 48 that:

... although the jury in this case will be obliged to deal with technically demanding scientific medical issues and unfamiliar terminology, as well as the conflicting evidence of experts, I am not satisfied that those considerations put this case beyond the range of functions credited to juries in our system.

[32] The plaintiff relies on various decisions where an application to strike was dismissed in medical negligence cases. While it is of note that none of those cases involves a traumatic birth case such as this, they do show the evolution of this modern view.

[33] For example, in *Allen v. Bishop of Victoria* (March 30, 2015) Vancouver S130659 (BCSC), Justice Groves noted as follows:

[31] Historically there is limited case authority for the proposition that cases involving medical malpractice relating to a child's birth are heard by a jury. The case of *Wipfli v. Britten*, 1982, 32 B.C.L.R. 343 (SC) is a case in which Chief Justice McEachern, as he then was, addressed the issue of a jury in a medical malpractice case involving the birth of twins.

[32] In dismissing the jury, or perhaps better put, granting the application to strike the jury, Chief Justice McEachern noted:

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.

[33] Since the *Wipfli* decision, there have been, in my respectful view, considerable advances in litigation techniques, specifically in one area, and that there is in cases such as this something called real time reporting.

[34] I am advised that real time reporting has been booked for this trial. Real time reporting results in almost immediate transcripts being available and, of course, being available obviously for a jury's reference and to assist the trier of fact in the necessary recall of detailed evidence.

- [35] The lack of that ability is a circumstance which gives rise or is the foundation of Chief Justice McEachern's decision in *Wipfli* when he granted the order striking the jury. Real time reporting and the fact that evidence transcripts will almost immediately be available to a trier of fact, a jury, is in my view a very significant change, and as I have noted, to a great degree undermines the basis of the analysis of Chief Justice McEachern in *Wipfli*.
- [36] Additionally there have been considerable advances in the use of juries in a number of personal injury litigation contexts. Most notably in motor vehicle personal injury cases juries are now often called upon to weigh a number of conflicting expert opinions. Juries are often called upon to assess the voracity of cost of future care reports, which often compete, or occupational therapist opinions, which are often different in both their nature and their scope, and of course life expectancy reports and many other areas in order for a jury to come up with an appropriate amount of damages.
- [37] Despite the capable argument of counsel for the defendants, I agree with the assessment of counsel for the plaintiff that much of the argument advanced by the defendants is designed to convince me that the case is too complicated, when, in fact, the case is relatively straightforward.
- [34] Similarly, in *Gladwell v. Busletta*, 2018 BCSC 1934 the court considered *Forde and Renearts (Guardian of) v. Korn*, Vancouver Registry, C937086, where at paras. 16-17, McEwan J. writes:
- [16] In reviewing the material in this case it strikes me that the issue as to whether there was negligence on the part of any of the medical defendants will turn largely on a series of findings of fact as to what actually occurred over a matter of hours on the night of December 16-17, 1985. While the jury may require some guidance respecting some aspects of some of the defendants' involvement, I do not see this matter as either intricate or complex. The documents that bear directly on this aspect of the claim are not numerous and will not involve prolonged investigation. The evidence as to the child's possible condition at birth is not extensive, nor is the expert evidence to be considered in connection with the apportionment of causation and liability.
- [17] On the issue of damages, there is a mass of detailed evidence including actuarial, medical, rehabilitation and other reports addressing the plaintiff's future needs and the cost of future care together with supporting medical, school and other records. Despite the daunting appearance of all this material, it appears that very little of it will require prolonged examination; there is no dispute that Ximena Renaerts is severely disabled and the issues concerning damages essentially concern the degree of assistance she will need and the duration over which it will be required. These are not matters inherently too complex or intricate for a jury.
- [35] The court in *Gladwell* noted follows at para. 53:

- [53] In *Allen v. Le Roux*, Vancouver Registry S121698, Master Baker gave oral reasons for judgment. He dismissed an application to strike in a medical malpractice case where there were many more parties than in this case. He reviewed the evidence in paras. 18-23, and then at paras. 32-33. In para. 33, he said, "I will not guild the lily and carry on, but that and what else he says in that paragraph is, I think, applicable ... " He is referring to McEwan J.'s decision in *Renaerts*.
- [36] The court then concluded at para. 62:
- [62] All of the cases relied on by the defendants appear to present more complexities than this one. In *Andersen*, there was a multiplicity of parties, a multiplicity of standards of care, and apparently novel applications of the law. In *Clower*, there were three plaintiffs. I have already commented on Truscott J.'s views. In *Ediger*, the plaintiff agreed that the issues were of an intricate and complex character.

Analysis

- [37] In this case there is no real dispute that there are significant documentary and scientific and medical investigation required in this matter with some 31 expert reports to date. It was not seriously argued that the first part of the test is not met by the defendants.
- [38] Rather, the question for this Court comes down to whether factual determinations based upon that evidence can be conveniently made by a jury.
- [39] The answer to that question may depend upon whether the issues are of an intricate or complex nature. However, as noted, the fact that they are intricate or complex does not necessarily mean that the factual determinations cannot be conveniently made with a jury present.
- [40] The plaintiff's arguments largely went to this point. Namely, that this is precisely what counsel and experts are retained to do, present the facts in a clear and concise manner even if they are complex and of a scientific or technical nature. The plaintiff pointed out that given that it is the plaintiff who has the burden to prove its claim, it is essentially nonsensical that a plaintiff would select a jury unless it was able to do that. As the plaintiff stated, confusion favours defence.
- [41] To illustrate this, the plaintiff's counsel presented the theory of the plaintiff's case in a clear and concise manner, explaining how the evidence will be tendered by him, with the plaintiff presenting his case first. Firstly, he noted that the facts set out in the various expert reports are all taken from the clinical records. In all likelihood, those facts will be presented through a document agreement by which it will be agreed that the clinical records accurately recorded the findings of the authors of such records.

- [42] In addition, the plaintiff argues that the documents are actually not voluminous. The clinical records are for a relatively short period of time, less than a day. The plaintiff argues that it will not be difficult to go through these clinicals with the jury and then take the jury to the expert reports to illustrate how each expert interprets those.
- [43] The plaintiff states that the experts will explain the results shown on the EFM with the use of an interactive white board, as well as give evidence as to the events surrounding the birth and actions taken or not taken, which either did or did not meet, the required standard of care in a manner that a jury will be able to digest and retain throughout the trial and the deliberation process.
- [44] In this respect, plaintiff's counsel took the court to excerpts of the defendants' discovery evidence where, notably, the remaining physician defendants confirmed various technical matters, including the way that a fetus communicates how it is dealing with the stress of labour, namely through the fetal heart rate, which is why it is tracked so carefully. As that defendant explained it, upon going into labour, the fetus goes under stress. During a contraction, which causes a similar effect on the fetus to holding one's breath, no oxygen is transferred to the fetus. A healthy person, as one could easily note, can hold their breath without any concern. In the case of a fetus, if they are not healthy, the contraction interferes with the oxygen transfer just as an unhealthy adult cannot hold their breath if, for example, they are suffering from various issues that relate to their breathing or lungs, which is shown in their heartbeat. I use this as one example as to how medical evidence can be presented in a clear, easily understood way. Although it was in respect of one very small portion of the whole of the case, it is illustrative of the ability of experts to do so.
- [45] Here, the liability issues will involve consideration of the plaintiff vulnerabilities by virtue of, for example, the plaintiff's mother gestational diabetes. By having the experts review the EFM of the clinical records, the plaintiff argues that he will be able to present a visual timeline documenting the participants' events, signs, and symptoms so that the jury will be able to easily follow the events.
- [46] In contrast, the defendants took the court through the various expert reports going from one report to the other and back again, emphasizing conflicts in the evidence and differences in the dozens of pages in which the factual assumptions are set out, with the overall argument being that each expert relies upon different facts, their own interpretations of the EFM, and scientific literature as a basis for their findings. Although not specifically stated this way, the suggestion was that if the experts cannot agree with what facts are relevant to, for example, determine causation, how could the jury? Of course, juries are routinely tasked with making findings of facts where experts do not agree.

- [47] The defendant argues that these issues are complex and that it is not sufficient to get the "gist" of the factual matrix. Rather, the facts must not only be understood by the members of the jury but retained throughout the whole of the trial and deliberation process. Here, while the issue as to the appropriate standard of care may be relatively simple and not based on as much complex scientific data, whether the standard of care was met may be slightly more complex, with much more limited evidentiary record.
- [48] The defendants argue that more problematic and complex is the issue as to causation, given their theory of the case and opinions of their experts that the injury may have predated the 37th week of gestation and that there may be various or more than one cause as a result.
- [49] The primary issues to be determined in respect of causation will be whether the injury arose during the three or four hours during which the plaintiff's mother presented at the hospital and gave birth and the plaintiff was initially treated, or sometime earlier. The defendants argued that if the injury occurred before that time, then there is no liability for the injuries regardless of the practitioner's care.
- [50] The plaintiff argued in response that liability is simpler than that. If the actions of the defendants worsened the effects of the plaintiff when a fetus, they will be liable. Thus, the plaintiff argues, while the defendants chose to present a number of alternative experts, like geneticists, that does not equate to causation being complex. The plaintiff argues that, ultimately, the primary and determinative expert opinions will be from the medical experts that one would expect to hear from, such as the neurologists who will each provide an opinion as to the cause of the brain injury.
- [51] In this case, the trier of fact will be faced with conflicts in the expert evidence which will be voluminous and may reference scientific literature. However, in exercising my discretion, I am to have regard to the high onus that a party seeking to have a jury notice struck must meet given the presumptive right of a party to have a jury in a civil trial, along with the overall character of the issues dispute, the cumulative effect of the findings of fact based on technical and scientific evidence that the jury will be asked to make in the context of the whole of the trial.
- [52] I note in that respect that matters have been simplified given the limited number of defendants that remain, namely the obstetrician who delivered the plaintiff, and the hospital with respect to the treating nurses.
- [53] Thus, having regard to the various factors, including those set out in Sidhu, while the number and volume of the experts being called upon is considerable, with some conflict in their opinions, I do agree with the plaintiff that the experts and counsel will be able to efficiently simplify matters to enable the jury to retain a sufficient understanding throughout the trial and deliberation through the use of the technology that is now available and through the use of simple tools such as medical glossaries and chronologies that will be available to it, having regard to the limited number of parties involved.

[54] I make this finding having regard to the modern view as to the sophistication of juries and the advancements in trial technology, which will enable the evidence to be presented in real time with the aid of computer images tracking the evidence such as the EFM, in a linear or sequential way that will make sense for the jury.

[55] As such, I agree with the plaintiff that this is a matter that can be conveniently determined by a jury. The application of the defendants is therefore dismissed.

[56] I will hear quick submissions on costs.

(SUBMISSIONS ON COSTS)

[57] THE COURT: I will make the order that the plaintiff shall have the costs of this application in the cause.

"Master Robertson"

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