

CANADA / JUDGMENT

Mohammed v. Farenholtz

2008 BCSC 1105

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1105 Mohammed v. Farenholtz IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Mohammed v. Farenholtz, 2008 BCSC 1105 Date: 20080410 Docket: M030775 Registry:

Vancouver Between: Hakim Mohammed Plaintiff And: Trevor D. Farenholtz and Nancy S.

Farenholtz and Alberto Aiello Defendants Before: Master Tokarek Oral Reasons for Judgment In

Chambers April 10, 2008 Counsel for Plaintiff P. Nigol Counsel for Defendants Moyotte, Mare,

Soriano and Hsieh K.P. Serne Counsel for Defendants Farenholtz and Aiello J. Walsh Place of

Hearing: Vancouver, B.C.

- [1] THE COURT: The plaintiff applies for an order striking the jury notice with respect to his personal injury claim. The brief background of this matter is as follows: the plaintiff was involved in a series of accidents from November of 2001 through September of 2004. Four of those accidents were subject to litigation. One has been described as an inevitable accident and is not the subject of an action.
- [2] The four outstanding actions, although not yet ordered, I understand are going to be tried together. Liability is admitted in two of them and denied in two of them. Liability may not be seriously denied, but circumstances and strategy are such that an admission of liability is not yet forthcoming.
- [3] As a consequence of those accidents, the plaintiff claims to have suffered a myriad of injuries that I need not list here, but certainly range from soft tissue to mild traumatic brain injury and much in-between. As a consequence of those allegations, many experts have been retained on behalf of both the plaintiff and the defence to deal with both the physical and psychiatric or psychological issues. There are psychiatrists, neurologists, orthopedic surgeons, general practitioners, physiatrists, occupational therapists and other expert evidence to be canvassed and dealt with.
- [4] The plaintiff claims that these reports present a picture of complexity such that it would be unreasonable to ask a jury to deal with those matters. Counsel referred to the difficulty in the medical terminology, the differences between opinions of respective experts on behalf of the parties, interrelationship between the different injuries, the difficulty in attributing the extent of the injuries to the specific accident in question and the difficulty of the jury in being able to follow and adequately address the evidence over what now seems to be in the

neighbourhood of a 20 day trial. As I understand the submissions, no definitive time has yet been fixed for how long this trial will take. It is presently set for 15 days, but I am told that it is anticipated to take longer, but no one has told me the worse case scenario as to how long that may be. So for the sake of argument, let us assume that a jury would have to sit for 20 days and deal with this evidence.

- [5] The authorities are voluminous on this issue. The nature of this application is such that it is relatively frequently brought before the courts, and not surprisingly where there is a discretion to be exercised, various members of the judiciary have taken a different approach to the facts of the particular case they were dealing with, but the general principles to be followed are well laid out in the authorities. I have reviewed them, and my decision is in keeping with those authorities.
- [6] Interestingly, this matter was set for trial back in 2005 at a time when two actions were going to be heard together. At that time, the plaintiff had different counsel. That trial was set to be heard before a jury and at no time did predecessor counsel take any steps to have that jury notice struck. The 2005 trial was adjourned, and at that time there was some considerable knowledge available to all involved with respect to the myriad of injuries sustained by the plaintiff.
- [7] Over the next two years, the difficulties the plaintiff experienced were well known and the subject of several treatments and reports. And in January of 2007, yet another trial by jury notice was issued. No effort was made by now present counsel, who took over back in 2005, to strike that jury notice until March of 2008.
- [8] One could almost infer from that that there really wasn't any significant concern as to the appropriateness of a jury, as frankly it would be difficult to imagine why, if there was a concern, neither of two plaintiff's counsels would have taken any steps to set it aside within the time limitations prescribed by the rules.
- [9] Nevertheless, I am now presented with a circumstance that requires a decision and I am told that at present, in light of all of the available reports, this matter is too complex and intricate for a jury to deal with. I have not read all of the reports during the course of this chambers application, and I do not intend to. I have read the portions of the reports referred to in counsels' outline and submissions and have read beyond that through some of the reports that were contained in the two thick binders that I was presented.
- [10] My impression, upon reading those reports, is that although there are a great many reports to deal with, they do not strike me as being overly complex or difficult. In fact, one or more of the reports, the exact numbers of which I neglect to make a note of so I cannot refer specifically to them in these reasons, but nevertheless one or more of these reports struck me as being very impressive in the way in which the author laid out in layman's terms some of the definitions and explanations of what the symptoms and injuries were all about.

- [11] I do not believe that the context of those reports, the terminology in those reports or the description of the plaintiff's injuries is complex enough to warrant dispensing with a jury. I say that bearing in mind that the onus is upon the plaintiff to establish that proposition.
- [12] However that then takes us to the issue of even if the reports in and of themselves don't present that degree of complexity, perhaps it would be too complex to expect a jury to ascribe the symptoms and injuries complained of by the plaintiff to the respective accidents. Now, that might well present a difficult task. Frankly, that aspect was the most concerning to me as I listened to submissions.
- [13] A further factor to consider is that defence counsel takes the position that there are significant issues of credibility with respect to this plaintiff and that a jury is ideally suited to deal with that issue. Counsel also asserts that with the help of schematics or good counsel's work who could make things clear, it is not at all as difficult as one would expect to be able to ascribe various injuries to the respective accidents.
- [14] The submission was that two of the accidents were very minor and that competent counsel could easily deal with this issue with respect to assisting a jury in understanding what injuries relate to what accident. On balance then, considering all of these matters, I conclude that the plaintiff has not met the onus of establishing that this is an inappropriate case for a jury.
- [15] There is in British Columbia, as plaintiff's counsel candidly admitted, a very strong right to a party to choose a trial by jury, subject to the restrictions imposed by legislation, and therefore the onus does fall to the plaintiff to make its case that the defendant ought not to have its right to a jury trial. As I have said, I believe that the plaintiff has fallen short of satisfying that onus in this particular case.
- [16] The application is dismissed. Costs will be in the cause. "Master Tokarek"

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