

CANADA / JUDGMENT

Mossey v. Johnatkinson-Ghulati

2025 BCSC 521

COURT

Supreme Court of British Columbia

DECIDED

24 March 2025

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2025 BCSC 521 Mossey v. Johnatkinson-Ghulati

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mossey v. Johnatkinson-Ghulati,

2025 BCSC 521

Date: 20250324

Docket: M127452

Registry: Kelowna

Between:

Nancy Joan Lillian Mossey also known as Nancy Joan Lillian Radke

Plaintiff

And

Jason Johnatkinson-Ghulati

Defendant

Corrected Judgment: The text of the judgment was corrected on the face page and in paragraph 5 on March 26, 2025

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiff:

B.E. Fitzpatrick

Counsel for the Defendant:

M.R. Martin

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 13, 2025

Place and Date of Judgment:

Kelowna, B.C.

March 24, 2025

Overview

- [1] These reasons for judgment concern a post-trial application brought by the plaintiff, Nancy Joan Lillian Mossey, also known as Nancy Joan Lillian Radke, in the context of an action for damages arising out of a motor vehicle accident which took place on December 22, 2018. Liability has been admitted and accordingly the sole triable issue remains determining the quantum of damages suffered by the plaintiff.
- [2] The trial commenced before a jury on January 13, 2025.
- [3] As I will detail, I declared a mistrial on January 20, 2025, as a result of a medical incident involving lead counsel for the defendant, which occurred in the courtroom and ultimately rendered him unable to continue with the trial. The defendant did not consent to the continuation of the trial with a judge alone at a later date.
- [4] With my leave, the plaintiff filed a notice of application on January 24, 2025 (the "Application"), seeking the following relief:
1. The Trial of this matter proceed by Judge only pursuant to Rule 12-6(12) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules") or, alternatively, pursuant to the British Columbia Supreme Court's inherent jurisdiction.
- ...
- [5] Specifically, the plaintiff submits that the term "misconduct" in R. 12-6(12) is not limited to deliberate wrongdoing and may instead extend to conduct that is innocent and unintentional. Alternatively, the plaintiff submits the court should exercise its inherent jurisdiction to order that the trial proceed by judge alone as part of its mandate to regulate its practice and procedures to prevent abuses of process and miscarriages of justice.
- [6] The defendant opposes the Application on the basis that there was no misconduct on the part of the defendant or defence counsel and, in the circumstances, it is not open to the court to order that the trial continue by judge alone absent its consent.
- [7] Both parties seek costs in any event of the cause.

Factual Background

- [8] The plaintiff filed the first notice of trial in September 2022 setting the matter down for a 10-day trial commencing in September 2023.
- [9] The defendant filed a notice requiring trial by jury shortly thereafter.
- [10] All the necessary pre-trial steps were taken to proceed with a trial by jury, including but not limited to payment of the required jury fees.
- [11] The first trial date, unfortunately, did not proceed because no judge was available.
- [12] The plaintiff filed the second notice of trial in January 2024 for a 15-day trial commencing January 13, 2025. The time estimate having been previously increased at the trial management conference held in anticipation of the September 2023 trial date.
- [13] The defendant again promptly filed a notice requiring trial by jury.
- [14] All the necessary pre-trial steps were taken to proceed with a trial by jury, including but not limited to payment of the required jury fees.
- [15] Consistent with the 15-day time estimate, there are numerous intended witnesses. The plaintiff's case included 8 experts and 13 anticipated lay witnesses.
- [16] The trial commenced on Monday, January 13, 2025. Certain preliminary matters were addressed, the jury was selected, and the plaintiff's lead counsel gave his opening statement that day.
- [17] The direct examination of the plaintiff took place on January 14, 2025 and continued into the morning of January 15, 2025.
- [18] On January 15, 2025 the following events occurred:
 - a) Cross-examination of the plaintiff by lead counsel for the defendant began at approximately 11:30 a.m.
 - b) The first 15 minutes of cross-examination of the plaintiff were completely unremarkable in terms of any identifiable issue with counsel's health and the questioning proceeded in a logical and orderly way.
 - c) At approximately 11:45 a.m., counsel asked a question that objectively did not make sense as the words seemed out of order. Upon being asked to rephrase, defence counsel attempted to restart the question said, "I'm sorry" and then, in my observation, simultaneously lost consciousness and collapsed to the floor of the courtroom. Paramedics were immediately called. Additional sheriffs attended and the jury was promptly dismissed from the courtroom before returning briefly to be formally stood down.

- d) At 2:00 p.m., lead defence counsel returned to the courtroom to request an adjournment for the remainder of the day. This adjournment, obviously, went unopposed and the trial was stood down until 2:00 p.m. on January 16, 2025 (the morning of January 16, 2025 having been previously allocated, with agreement of counsel, for the hearing of an unrelated matter).
- [19] There were appearances before me on January 16 and January 17, 2025 as the instructions were sought from the defendant as to its position on how to proceed and inquiries made about the status of defence counsel's health. Counsel at those appearances was the principal of the firm representing the defendant and second chair from the trial as there was provided, in due course, medical evidence confirming that lead counsel was unable to continue the trial and was off work due to a medical condition for a minimum of two weeks. At the conclusion of the January 17, 2025 hearing I advised that I would be declaring a mistrial on Monday, January 20, 2025 when the jury would be back in attendance.
- [20] The issue of proceeding by judge alone was discussed at the January 17, 2025 appearance. Lead counsel for the plaintiff advised that he required time to consider his position on whether the plaintiff could apply for the trial to proceed by judge alone in the circumstances. I granted leave for the plaintiff to consider if there was a basis for the trial to continue without a jury and, if so, advised counsel to confer as to an appropriate time for such a hearing and to contact Supreme Court Scheduling to schedule the application.
- [21] On January 20, 2025, I declared a mistrial. Plaintiff's lead counsel advised that he needed until January 13, 2025 to consider his position further and provide application materials to the defendant if he intended to proceed. I directed that the plaintiff had leave to bring the application if the counsel determined it was appropriate to do so, or alternatively, that I would make myself available for a short appearance to discuss resetting the matter for trial before a jury with some priority status.
- [22] Ultimately, the plaintiff filed the Application and it proceeded for hearing before me on March 13, 2025.

Analysis

- [23] I received quite lengthy written arguments in both the Application and the corresponding application response, supplemented by the relatively brief oral hearing referred to above. In this particular situation, the oral hearing assisted the Court significantly in concisely getting to the result.
- [24] In my view, the Application turns on the simple interpretation of R. 12-6(11) and (12) of the Supreme Court Civil Rules which address the continuation of a trial without a jury and, in particular, the interpretation of the word "misconduct" in R. 12-6(11).
- [25] The governing rules, R. 12-6(11) and (12), provide as follows:

Rule 12-6 - Jury Trials

Continuing trial without jury

- (11) If, for any reason other than the misconduct of a party or the party's lawyer, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.
- (12) If, by reason of the misconduct of a party or the party's lawyer, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose lawyer's conduct, is complained of, may continue the trial without a jury.
- [26] Looking back, the current Rules came into force on July 1, 2010. The previous version of R. 12-6(11 and (12) was R. 41(6) and (7). The substantive language was the same, with only minor stylistic revisions. Specifically, the previous rules, with changes highlighted, provided as follows:

Rule 41 - Orders

Continuing trial without jury

- (6) Where, for any reason other than the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.

Idem

- (7) Where, by reason of the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose counsel's conduct is complained of, may continue the trial without a jury.

[Emphasis added.]

- [27] Cases decided under R. 12-6(11) and (12) have cited cases decided under the previous R. 41(6) and (7) as authoritative. By way of example, in *Vander Maeden v. Condon*, 2013 BCSC 1810 [Vander Maeden], the Court applied several decisions made under the previous Rules, found that the submissions of counsel for the plaintiff amounted to misconduct and, at the request of the defendant, ordered that the trial continue by judge alone pursuant to R. 12-6(12): see *Vander Maeden* at paras. 9-12, 35-38.
- [28] Ultimately, I accept the submission of the respondent that these provisions, when read together, establish that a party who had previously required a jury is entitled as a matter of right to have the trial re-set to be heard by a jury, with only one exception. That is where said party or their lawyer is guilty of misconduct. Otherwise, the right to a new trial by jury is unconditional, regardless of the reason why the trial needs to be retried.

- [29] The underlying rationale being that R. 12-6(12) is punitive in nature. If the party or their lawyer who required the jury commits "misconduct" causing the jury trial to be retried, their punishment is the "loss" of their jury for the future trial.
- [30] This punitive nature of the remedy available under R. 12-6(12) underscores the need for the "misconduct" of a party or their counsel to be legally objectionable malfeasance. Put simply, the "misconduct" threshold disincentivizes parties and counsel from either intentionally or unintentionally but voluntarily triggering a mistrial in order to obtain a strategic advantage, such as pursuing a more favourable jury or obtaining more time to gather evidence after hearing the testimony of a particular witness.
- [31] Failing such legally objectionable malfeasance requiring sanction, there is no apparent basis to deprive a party of their right, albeit not absolute right, to a jury simply because a trial has to be retried.
- [32] Rule 12-6(11) and (12) thus create a two-step test.
- [33] Firstly, if circumstances arise in which a trial by jury would need to be retried, the court must determine whether the reason for a new trial is the misconduct of a party or the party's lawyer. If the court determines that misconduct was not the reason the trial would need to be retried, the analysis stops and the judge cannot continue the trial without a jury without the consent of the party who required a jury trial.
- [34] However, if the court does conclude that misconduct by a party or their lawyer is the reason the trial needs to be retried, the presiding judge may, as a matter of discretion, continue the trial without a jury. It is at this stage of the analysis that the court may consider factors such as the prejudice to each party as part of the exercise of its discretion: see *Lawson v. McGill*, 2003 BCSC 883, at paras. 25-26.
- [35] Turning then to the correct interpretation of the word "misconduct". "Misconduct" is not a defined term in the Rules, nor does it appear in any other provision in the Rules or the previous Rules.
- [36] There is, however, appellate case law defining the term "misconduct" in effectively the same context as is before the Court in the Application. In *Ennis v. Allenby*, 2007 BCCA 80 [Ennis], Mr. Justice Hall stated as follows at paras. 12 and 14:
- [12] Misconduct is a strong term. Allegations of misconduct of counsel should be sparingly advanced by opposing counsel and judges ought to be suitably cautious in making such a finding against a member of the bar. . . .
- [14] . . . A finding of misconduct under this Rule should only be made when the conduct is seriously at odds with the conduct to be expected of counsel . . . [Emphasis added.]

- [37] Conduct rising to this level occurred in the quite dated case of *Birkan v. Barnes* (1992), 69 B.C.L.R. (2d) 132 (C.A.) [*Birkan*] which is cited in *Ennis*. In *Birkan*, during the concluding address to the jury, plaintiff's counsel breached an undertaking to the court and disobeyed a prior ruling of the trial judge by informing the jury that the reason the plaintiff did not take the stand was because the plaintiff had no memory of the collision at issue.
- [38] The plaintiff relies on *Birkan* as authority for the proposition that "misconduct" within the meaning of the previous R. 41(7), now R. 12-6(11) as noted, is not limited to deliberate wrongdoing and "may instead arise innocently and unintentionally". I do not accept that this is an accurate description of the Court's reasoning in that case. The words "innocently and unintentionally" do not appear anywhere in the reasons in *Birkan*. The closest statement to that effect is the quotation from the trial judge that he did not "attribute any wrongful motives to plaintiff's counsel". That is not analogous. Moreover, *Birkan* obviously does not consider whether an unintentional and involuntary situation, such as a medical emergency, could be characterized as "conduct" let alone "misconduct" given such circumstances are so far removed from the facts of the case under appeal.
- [39] I further do not accept the proposition that *Birkan* stands for the proposition that the right to a jury trial may be forfeited in the event of misconduct and "perhaps other reasons". That would take the statement at *Birkan*, found at para. 21 of the decision, out of context.
- [40] I similarly find that the decision in *McLachlan v. Hamon*, 2001 BCSC 1679, relied on by the plaintiff to be distinguishable. The questionable conduct of defence counsel in that case involved multiple infractions--both in questioning and in submissions. Although the Court did state that the use of the word "misconduct" did not refer to the type of conduct that would result in censure of counsel for the defendant with the Law Society or elsewhere, there is a wide chasm between unintentional questionable conduct and unintentional involuntary "conduct".
- [41] A much more on point authority is *M.D. v. Barr*, 2005 BCSC 591. In that case, which involved the application of the prior R. 41(6) and (7), the Court expressly considered the issue of a medical condition affecting a party in the course of a jury trial. Specifically, during the course of the trial it became apparent through the plaintiff's own testimony that his mental state was irrational, illogical and unreliable through no fault of his own. The Court found that R. 41(6) applied and, because the party requiring a jury did not consent to continue by judge alone, ordered a new trial: see paras. 12, 33-34.
- [42] Ultimately, I do not accept that an unforeseen and incapacitating medical event fits into the definition of "misconduct". It is not conduct, to the extent it even qualifies as same, that is, to use the language of Justice Hall in *Ennis*, "seriously at odds with [what is] to be expected of counsel".

- [43] Having concluded that there is no misconduct, there is no need to consider whether it is appropriate, in my discretion, to continue the trial without a jury over the objection of the defendant.
- [44] I will, however, acknowledge that the defendant made good faith efforts to mitigate prejudice to the plaintiff by voluntarily making certain significant concessions pertaining to costs thrown away and the exclusion of certain disbursements from falling under the rubric of the Disbursements and Expert Evidence Act Regulation, B.C. Reg. 210/2020.
- [45] Apart from this, I certainly recognize there is the obvious prejudice of delay. This was the second jury trial scheduled in this matter and the accident in question took place back in 2018. I expressed concerns about this in discussions with counsel in the absence of the jury on January 17, 2025 and it was central to my decision to allow plaintiff's counsel the opportunity to research the issue and ultimately bring forward the Application. However, on the evidence before me in the application record, I am not satisfied that the delay is as significant as feared given there are (or at least were) 15-day trial sittings as early as February 2026 offered to the parties if counsel were able to adjust their trial calendars to accommodate same.
- [46] Finally, having regard to the fact that I have concluded that this Application falls squarely within the parameters of R. 12-6(11) and (12), I further reject the plaintiff's argument that the court's inherent jurisdiction may be used to allow a continuation of the trial by judge alone in the absence of misconduct or the consent of the party requiring trial by jury. That would run afoul of the principle that it is inappropriate to invoke inherent jurisdiction to justify a decision that is contrary to the principles guiding the application of the Rules: see *Fan v. Chana*, 2011 BCCA 516 at para. 61; *Harder v. Poettcker*, 2016 BCCA 477 at paras. 58-61.

Costs

- [47] Costs are awardable at the discretion of the chambers judge.
- [48] The general principle is that costs are awarded to the successful party, but those costs are at the discretion of the presiding justice: Supreme Court Civil Rule 14-1(9). This is the same following a trial, summary trial or, in this case, an application.
- [49] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal succinctly stated the law regarding costs as follows:
- [71] Rule 14-1(9) . . . grants unqualified discretion to depart from the prima facie rule that the successful litigant should be awarded its costs.
- [72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

- [50] The defendant was successful in opposing the relief sought in the Application and is thus presumptively entitled to its costs.
- [51] Notwithstanding this, I would have, at first instance, exercised my discretion to order the parties to bear their own costs given this was an exceptional situation which arose out of circumstances totally outside of the plaintiff's control.
- [52] However, the evidence tendered by the respondent in opposition to the Application shows that the Application and supporting affidavit were delivered at the close of business on a Friday returnable on a Wednesday, leaving the respondent effectively two business days to complete materials before the application record was due to be filed. Moreover, the hearing date was not canvassed with the defendant's counsel (who was not trial counsel) and an adjournment request was initially denied.
- [53] The explanation provided by plaintiff's counsel for the timing of the delivery of the materials was because it fell within the time previously allocated for the trial. However, irrespective of whether the trial was ordered to proceed with judge alone, it was not going to continue as scheduled because lead counsel was medically unable to participate and second chair was not in a position to take over sole conduct of a trial of this complexity given her date of call.
- [54] In light of those additional facts, I conclude that the defendant is entitled to its costs of the Application. Those costs are payable in any event of the cause, given that liability has been admitted: see the unpublished decisions of *Caron v. Tromp* (24 April 2023), Abbotsford M00694 (B.C.S.C.); *Danton v. Stevens* (28 June 2017), New Westminster M166013 (B.C.S.C.). The costs are not payable forthwith.

"Hardwick J."

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