

CANADA / JUDGMENT

Moulton v. Wong

2020 BCSC 2121

COURT

Supreme Court of British Columbia

DECIDED

18 November 2020

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2020 BCSC 2121 Moulton v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moulton v. Wong,

2020 BCSC 2121

Date: 20201118

Docket: S172273

Registry: Vancouver

Between:

Wanda Jean Moulton

Plaintiff

And

Dr. Christopher Wong, Dr. Walter M. Paton,

Dr. Nadra Ginting, Dr. Robert Matthew Smith,

and Dr. John Doe

Defendants

Before: The Honourable Mr. Justice Skolrood

Oral Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff

appearing via teleconference:

D.J. Renaud

Counsel for the Defendants

appearing via teleconference:

A.D. Atkinson

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2020

- [1] THE COURT: This is an application by the plaintiff to adjourn a trial scheduled to begin on January 4, 2021. The plaintiff seeks the adjournment in order to permit her trial to proceed before a jury.
- [2] The defendants oppose the adjournment application and say that the trial should continue before a judge sitting alone in keeping with Rule 12-6(0.2)(a) of the Supreme Court Civil Rules.
- [3] Rule 12-6, the rule governing jury trials, was amended by Order in Council No. 517 dated September 18, 2020, in order to suspend civil jury trials until October 3, 2021, and to address the consequences for trials scheduled to be heard by juries during the period of suspension. I will return to the new subrule shortly.

Background

- [4] The underlying litigation involves a negligence claim brought by the plaintiff against the defendant doctors. While the style of cause names a number of doctors, the claim has been settled against two of them, leaving Drs. Ginting and Smith as the remaining defendants.
- [5] Briefly, the plaintiff is currently 57 years old. Up until 2015, she worked for many years in the food services industry, having trained as a cook.
- [6] She alleges that on March 31, 2015, she experienced a pinching sensation in the palm of her left hand while pressing down on a cookie cutter at work. In the evening of March 31, 2015, she felt pain in her left hand and observed a discolouration. The next morning, April 1, 2015, she went to a walk-in clinic. The physician there recommended an X-ray.

- [7] Over the next few days, her symptoms persisted so she attended the emergency department at Langley Memorial Hospital on April 5, 2015. She saw an emergency room doctor, who referred her to the defendant, Dr. Ginting, a vascular surgeon. She saw Dr. Ginting on April 13, 2015. The plaintiff alleges that Dr. Ginting was dismissive of her concerns.
- [8] The plaintiff reattended Langley Memorial Hospital emergency department on April 22, 2015, and saw a different emergency doctor. She was sent to Abbotsford Regional Hospital and was admitted under the care of the defendant, Dr. Smith.
- [9] The plaintiff alleges that she did not receive treatment until April 29, 2015. Her symptoms progressed quickly and, ultimately, her left arm was amputated on May 14, 2015, and her right leg on May 29, 2015, due to ischemia in her limbs. She alleges that the defendant doctors were negligent in failing to properly diagnose and treat her condition. She has sworn an affidavit describing the significant adverse impacts she has suffered as a result of her condition and the amputation of her limbs.

Procedural History

- [10] The plaintiff filed a notice of civil claim on March 10, 2017. At the time, she was self-represented.
- [11] On February 27, 2018, the defendants filed a response to civil claim. In February of 2019, the plaintiff retained her current counsel. He filed a notice of trial on September 26, 2019, and setting the matter for a 15-day trial commencing January 4, 2021. At the same time, the plaintiff filed a jury notice.
- [12] On October 16, 2019, the defendant served a notice of application to strike the plaintiff's jury notice. That application was adjourned by consent pending the exchange of expert reports.
- [13] Examinations for discovery have been conducted of both the plaintiff and the defendants.
- [14] On July 17, 2020, the court suspended all civil jury trials until January 2021 due to COVID-19. Anticipating a further possible suspension, the plaintiff sought the defendants' consent to an adjournment of the trial. The defendants did not consent.
- [15] On September 10, 2020, the defendants advised of their intention to proceed with their application to strike the jury notice. That application was set for November 6, 2020.
- [16] On September 18, 2020, by way of Order in Council 517/20, civil jury trials were further suspended to October 3, 2021. The plaintiff then again sought the defendants' consent to adjourn the trial and again the defendants declined. The defendants also advised of their intention not to proceed with the application to strike the jury notice. The plaintiff's adjournment application then proceeded on the date that had been reserved, November 6, 2020.

Amendment of Rule 12-6

- [17] The current application involves measures put in place as a result of COVID-19 which impacted the operations of the court generally, including with respect to jury trials. It is worth touching further on the background facts that ultimately led to the new Rules governing civil jury trials.
- [18] On March 19, 2020, the Chief Justice suspended regular operations of the court at all locations. Subsequent notices suspended all civil and family trials scheduled to begin on or before June 5, 2020. COVID-19 Notice No. 22 provided that trials scheduled to begin on or after June 8, 2020, would resume, but civil jury trials continued to be suspended up to and including September 7, 2020, which was later extended to January of 2021.
- [19] As noted, on September 18, 2020, the Lieutenant Governor in Council passed Order in Council No. 517 amending Ruling 12-6. The amendment further suspended civil jury trials to October 3, 2021. The amendment also added the following new subrules to 12-6:
- (0.1) Subrules (1) to (12) of this Rule do not apply during the period starting on September 28, 2020 and ending on October 3, 2021.
- (0.2) During the period referred to in subrule (0.1) [being the period of September 29, 2020, to October 3, 2021],
- (a) a trial must be heard by the court without a jury regardless of whether a party filed or served a notice, or paid any sum for the jury and the jury process, under this Rule,
 - (b) the court may transfer a proceeding to the Provincial Court of British Columbia under section 15 of the Supreme Court Act even though a party has filed a notice requiring a jury trial under this Rule, and
 - (c) a party may not apply for an adjournment of a trial because the party may want to require that the trial be heard by the court with a jury, unless the court otherwise orders.
- [20] As is apparent from the wording of these new subrules, the intent was that any trial scheduled to be heard by a jury prior to October 3, 2021, would default to trial by judge alone.

The Parties' Positions

- [21] During the initial period of suspension of jury trials and before the new subrules were enacted, there were a number of applications brought to strike jury notices. These applications were typically brought by plaintiffs in motor vehicle cases where the defendant had taken out the jury notice and wanted to continue to proceed before a jury thus requiring an adjournment of the trial. I will touch on some of those cases in a moment. The advent of the new subrules meant that such applications were no longer necessary.

- [22] The plaintiff submits that the right to a jury trial is a significant and longstanding substantive right that should not lightly be denied: *Cliff v. Dahl*, 2012 BCSC 276, at para. 20. She submits that a plaintiff in a medical malpractice case like this faces an uphill battle. Not only does she have the burden of proof, which is true for plaintiffs in all negligence cases, she is up against a sophisticated, well-funded, institutional litigant. She submits that she will be significantly prejudiced if she is denied her ability to present her case to a jury whereas the prejudice to the defendants from a delay resulting from an adjournment is minimal.
- [23] The defendants submit that the new subrules make it clear that trials scheduled to be heard by juries during the period of suspension automatically default to trials by judge alone and that it is not open to a party to apply to adjourn the trial simply because that party would prefer to proceed before a jury. The defendants submit that the plaintiff has expressed little more than a preference for a jury trial which is not sufficient for the purposes of the subrule. The defendants submit further that the plaintiff has led no evidence to indicate that she will not receive a fair trial in front of a judge alone and that they will be prejudiced by a delay, both as a result of the passage of time and the likely additional expense that will occasion.

Discussion

- [24] There are a number of recent court decisions that have considered the right to a jury trial in the context of the COVID-19 pandemic. As I indicated, these decisions predate the new subrules and generally dealt with situations in which plaintiffs in motor vehicle cases sought to strike jury notices in the face of defendants wishing to proceed in front of a jury. An example is *Cheung v. Dhaliwal*, 2020 BCSC 911. There, the plaintiff applied to strike the defendants' jury notice so as to permit his trial to proceed before a judge alone. Master Vos granted the application. He said at paras. 13 and 19 to 20:
- [13] Although jury trials are deeply rooted in our justice system, a litigant does not have an absolute right to a jury trial in a civil action. Cases relating to certain areas of law must be heard without a jury (see Rule 12-6(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules")). Furthermore, there are circumstances where the court may refuse trial with a jury (see Rule 12-6(5)).
- [19] An adjournment of the trial would obviously be prejudicial to the plaintiff as it would delay his day in court and thereby his ability to resolve the litigation and get on with his life. His counsel also points out that if the trial is adjourned additional expert fees will likely be incurred, as some reports will need to be updated for the new trial date.
- [20] On the other hand, if the trial proceeds on June 22, 2020 the only prejudice the defendants would suffer would be that the mode of trial would not be the mode they chose; trial by jury. Although the defendants may lose any tactical advantage they may believe they would have if the case is tried with a jury, they nevertheless would be assured of a just determination of the issues on the merits.

[25] Cheung was considered by Master Bouck in *Hundza v. Doe*, 2020 BCSC 1370, which involved similar circumstances. She said the following about the defendant's wish to proceed before a jury at para. 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.

See also *Vacchiano v. Chen*, 2020 BCSC 1035.

[26] As is apparent, these cases make the point that in a civil context, there is no absolute right to a jury trial. Beyond that, however, the cases are of relatively limited relevance to the present application. That is because they are applications to strike a jury notice and they predate the amendments to the Rules.

[27] In addition, the context in which these cases were decided cannot be ignored. At the time, the court was resuming operations and was looking at ways of ensuring that parties could proceed with trials in a timely manner. In the motor vehicle context, the institutional defendant was resisting converting to judge-alone trials and was seeking to delay trials accordingly. As reflected in the decisions referred to, the court was generally disinclined to permit such delays.

[28] That is also the context in which Rule 12-6 was amended, although it should be noted that the new subrules on their face are not restricted to jury trials in the motor vehicle context, but rather apply to all trials scheduled to be heard by a jury during the period of suspension.

[29] That said, Subrule 12-6(0.2)(c) which addresses adjournment applications, is far from a model of clear drafting. For ease of reference, I will repeat it:

a party may not apply for an adjournment of a trial because the party may want to require that the trial be heard by the court with a jury, unless the court otherwise orders.

[30] The first thing to note, as submitted by the plaintiff, is that the subrule does not foreclose entirely the possibility that a party may apply to adjourn a trial in order to maintain the ability to proceed before a jury. Rather, the intent was clearly to leave open the ability of a party to do so subject to the discretion of the court.

[31] A second point to note is that it is not entirely clear whether the qualifying phrase, "unless the court otherwise orders," applies to the party's right to bring an adjournment application at all or to its ability to raise its preference for a jury trial as a ground in support of the adjournment. Given that uncertainty, the plaintiff here filed both an application for leave to bring her adjournment application and the adjournment application itself.

- [32] Third, in terms of the language of the subrule, it is also unclear what the phrase, "because the party may want to require that the trial be heard by the court with a jury," is intended to convey. Is it only parties who have an undefined preference for a jury trial that are precluded from applying to adjourn on that basis or does the subrule also foreclose adjournment applications where a plaintiff has a strategic or substantive reason for wanting a jury?
- [33] Dealing with the procedural issue first, I do not believe that the intent of the subrule was to create a two-step process with an applicant first required to obtain leave to bring an adjournment application in order to argue in favour of a jury trial. Such a process would not be in keeping with the overall objective of the Rules as reflected in Rule 1-3 of securing a "just, speedy, and inexpensive determination" of matters. Further, it was open to the Lieutenant Governor in Council to expressly incorporate a leave requirement if that were, in fact, the intent.
- [34] Rather, as I read the subrule, a party may apply to adjourn a trial, including a trial scheduled to be heard by a jury, without first seeking leave, but an adjournment will not generally be granted simply in order to accommodate one party's expressed preference for a jury trial. However, that is not an absolute and the court maintains a discretion to grant an adjournment in order to permit a case to proceed before a jury. That is the intent of including the phrase "unless the court otherwise orders" in the subrule.
- [35] The jury issue is, in my view, one factor to consider as part of the analysis on an adjournment application. Such applications are subject to the principles established by the courts governing adjournments. A leading discussion of those principles can be found in *Navarro v. Doig River First Nation*, 2015 BCSC 2173, where Madam Justice Dillon said at paras. 18 and 19:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012

ONCA 60 at para. 12 (Graham)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (Graham at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (Graham at para. 12).

[36] Justice Dillon went on at para. 20 to identify a number of factors that may inform the analysis including: the reasonableness of the request, the grounds or explanation for the adjournment, the potential prejudice to each party, and the right to a fair trial. She then underscored the point at para. 21 that:

Securing a fair trial on the merits of the action is the ultimate goal.

[37] In the present case, I am satisfied that the plaintiff has acted in a reasonable and timely manner in seeking an adjournment of the trial once the suspension of jury trials was first announced.

[38] To my mind, the application turns on the grounds advanced by the plaintiff for the adjournment, in particular, the rationale provided for permitting the trial to continue before a jury and the balance of prejudice as between the parties.

[39] In terms of the plaintiff's rationale for proceeding before a jury, I am satisfied that it goes beyond her simply "wanting" a jury trial, to paraphrase the wording of the subrule. I agree with the plaintiff that a litigant in her position in this type of case faces significant challenges. The burden on her to establish medical negligence is steep and, again, she is up against a professional and well-funded institutional litigant.

[40] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 158, Mr. Justice Cory underscored the important role of juries:

Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community.

[41] Similarly, in *Boyd v. Harris*, 2004 BCCA 146, Mr. Justice Smith said at para. 10:

juries bring to the assessment of the evidence a common sense that derives from wide and varied experiences in life. As well, a jury's assessment of damages is influenced by the community's values and its opinions of what would be fair, just, and reasonable in the circumstances.

See also *Lawson v. Baines*, 2012 BCCA 117; and *Ismail v. Fleming*, 2018 ONSC 6780.

- [42] I agree with the plaintiff that given how she frames her claims, this is a case that is particularly suited to the common sense and community values and experience brought to bear by juries. Again, I am of the view that the plaintiff's rationale for proceeding before a jury transcends a mere preference for doing so. Also, it is not a mere strategic choice as was the case on the part of the defendants in the motor vehicle cases.
- [43] That brings me to the question of prejudice, particularly the prejudice that would result from a delay in the trial if an adjournment is granted. It is arguable that the party most prejudiced by an adjournment is the plaintiff herself given that there will be a further delay in having her claims determined, yet she is prepared to accept the burden of that delay in order to maintain her ability to proceed before a jury.
- [44] The defendants submit that they will be prejudiced by the adjournment both in terms of delay and additional expense. The courts have commented on the impact of delay on medical practitioners. For example, the defendants cite *Morgan v. Royal Inland Hospital*, (26 May 1989), Vancouver CA010451 (B.C.C.A.), an unreported decision of our Court of Appeal, where the court said:

Would the respondents be unduly prejudiced by an extension? I consider that keeping this one doctor on tender hooks is of prejudice to him in the practice of his profession. These negligence actions are a horrendous burden on doctors.

- [45] The defendants also cite *Cleugh v. Jones*, 2001 BCSC 1880, where the court stated:
- [6] This is a medical malpractice case, and there are a number of authorities which have made reference to the difficulty and stress that professionals must cope with when facing a negligence action, and one can only be guided by decisions in the past which conclude that the pressure on a professional who is alleged to have been negligent is more stressful or difficult to deal with than that of a normal defendant or a nonprofessional defendant in, for example, a debt action.
- [46] I do not doubt that being subject to a medical negligence claim is a stressful experience for physicians. However, I do not accept that it is more burdensome than for the lay litigant who has suffered some form of injury or damages and is seeking compensation.
- [47] The defendants note that numerous expert reports have been prepared and exchanged by both parties. They submit that a delay in the trial, which is likely to be for at least 18 months, will likely require some reports to be updated and may involve further assessments of the plaintiff. Respectfully, as the plaintiff submits, the damages that the plaintiff has suffered have largely crystallized in the sense that she has lost an arm and a leg. That is not going to change. While there may well be a need to update some of the plaintiff's personal and financial circumstances, I would not expect it to be extensive.
- [48] In summary, I am satisfied that the prejudice to the plaintiff of not being able to present her case to a jury outweighs the prejudice to the defendants from an adjournment at this time.

- [49] Let me address two further points raised by the defendants. First, they fairly point out that there is no guarantee that the court will resume civil jury trials in October 2021 or any time thereafter. That is true. However, speculation about what may or may not happen in the future is not a sufficient ground for me to deny an adjournment at this time.
- [50] Second, the defendants submit that even with an adjournment, the plaintiff may still not be able to proceed before a jury because they intend to pursue their application to strike the jury notice. Frankly, it would been preferable for both the adjournment application and the application to strike to be heard together. However, that did not occur and, given that I am only dealing with the adjournment application, I am not prepared to anticipate the results of the strike application.
- [51] I would add that, pursuant to new subrule 12-6(0.1), the entirety of Rule 12-6, apart from the new subrules, is suspended until October 3, 2021, including subrule 12-6(5) dealing with the striking a jury notice. It is thus not clear how or when an application to strike could, in fact, proceed.

Conclusion

- [52] In summary, the plaintiff's application to adjourn the trial currently scheduled to begin on January 4, 2021, is granted.
- [53] Given that this was the first application of this kind, where it was the plaintiff seeking the adjournment in order to maintain the jury trial, it is, in my view, appropriate for the parties to each bear their own costs.
- [54] Those are my reasons. Anything arising, counsel?
- [55] MR. RENAUD: Nothing, thank you, My Lord.
- [56] MR. ATKINSON: I just had one issue, My Lord, if the adjournment was granted, we had in our notice -- or application response sought leave to make submissions on conditions for an adjournment pursuant to Rule 13-1(19) and the submission that we would seek an order from you that we have leave -- for a further discovery of the plaintiff and for an updated assessment with our psychiatrist, Dr. Willms.
- [57] THE COURT: Mr. Renaud?
- [58] MR. RENAUD: Well, I would have hoped that that would have been brought during the course of the adjournment application. I was not prepared to deal with that this morning. I do not think that there would be any difficulty granting further discoveries and medical examinations, and I have no intention of being unreasonable in that regard, but I don't see that it is necessary that it be part of the order.
- [59] THE COURT: I am going to make it a term of the adjournment that the defendants will be at liberty to conduct a further examination for discovery limited to any changes in circumstances from the date of the last discovery to the new trial date or the date of the next

discovery. I am not going to make an order about any additional medical examinations at this time. I think the parties will have to obtain a new trial date, see where things stand, and can address the issue at that point. But I do think it reasonable to make clear that some further discovery for the purposes of updating is appropriate.

"Skolrood J."

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