

CANADA / JUDGMENT

Perpich v. Javer

2020 BCSC 313

COURT

Supreme Court of British Columbia

DECIDED

7 February 2020

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2020 BCSC 313 Perpich v. Javer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Perpich v. Javer,

2020 BCSC 313

Date: 20200207

Docket: S170230

Registry: Vancouver

Between:

John M. Perpich

Plaintiff

And

Dr. Amin R. Javer

Defendant

- and -

Docket: 191745

Registry: Vancouver

Between:

John M. Perpich

Plaintiff

And

Dr. Eng Cern Gan

Defendant

Before: The Honourable Mr. Justice Giaschi

Oral Ruling Re Applications to Add a Defendant

and/or Consolidate Two Actions

In Chambers

Counsel for the Plaintiff:

J. Battista, Q.C.

Counsel for the Defendant:

D.W. Pilley

A. Catalano, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

January 28 and February 4, 2020

Place and Date of Ruling:

Vancouver, B.C.

February 7, 2020

[1] THE COURT: There are two actions and three applications before me.

[2] The first action, Vancouver Action No. S170230 ("Action #1"), was commenced on January 10, 2017 by Mr. Perpich against Dr. Javier. The second action, Vancouver Action No. S191745 ("Action #2"), was commenced on February 19, 2019 by Mr. Perpich against Dr. Gan. The notices of civil claim in the two actions are identical with the exception of the named defendant. In both actions the plaintiff alleges the defendant performed a sinus surgery on April 23, 2013. In both actions the plaintiff alleges that the defendant placed a spacer in his sinuses during the surgery and negligently failed to identify and remove the spacer during his post-operative care. The spacer was discovered on June 27, 2015, when the plaintiff had a CT scan of his sinuses. In both actions the plaintiff alleges that as a consequence of the negligence of "the defendant", he suffered injuries for which damages are claimed.

[3] Drs. Javier and Gan apply in each of Actions #1 and # 2 to consolidate the two actions. Mr. Perpich applies in Action #1 to add Dr. Gan as a defendant to Action #1 and to file an amended statement of claim in that proceeding.

BACKGROUND

- [4] The circumstances that led to the multiple actions are not disputed. Action #1 against Dr. Javier was filed on January 10, 2017, and served on or about October 2, 2017. A response was filed by Dr. Javier on December 21, 2017. The response made no mention of Dr. Gan being involved in the surgery or the post-operative care. Dr. Javier was examined for discovery on May 31, 2018 and gave evidence that Dr. Gan had been involved in the post-operative care of Mr. Perpich under a fellowship arrangement. Mr. Perpich submits that this was the first time he became aware of Dr. Gan's involvement. Although, it is notable that no affidavit to this effect has been filed by Mr. Perpich.
- [5] Following the examination for discovery of Dr. Javier, counsel for Mr. Perpich wrote to counsel for Dr. Javier on November 7, 2018, advising that, given the discovery evidence, it appeared they would have to add Dr. Gan as a defendant to Action #1. On December 5, 2018, counsel for Mr. Perpich again wrote to counsel for Dr. Javier requesting documentation relating to the fellowship arrangement between Drs. Javier and Gan. On January 25, 2019, counsel for Dr. Javier responded that Dr. Javier no longer had any such documents.
- [6] On February 11, 2019, counsel for Mr. Perpich again wrote to counsel for Dr. Javier advising that he needed to add Dr. Gan as a defendant. He expressed some urgency and advised that he anticipated bringing an application shortly. However, rather than immediately bringing the application to add Dr. Gan as a defendant to Action #1, Mr. Perpich commenced Action #2 against Dr. Gan on February 19, 2019. The notice of civil claim was provided to counsel for Dr. Javier for information purposes on February 20, 2019. The covering letter advised that the next step would be to add Dr. Gan "to the ongoing action"
- [7] On March 4, 2019, counsel for Dr. Javier advised counsel for Mr. Perpich that he was also retained by Dr. Gan. He further advised he would seek consent to join the actions and to adjourn the pending trial date.

I have just been retained to represent Dr. Gan. I will seek instructions to consent to having his action joined with Dr. Javier's and to consent to an adjournment of the trial to that June date if it is still available. We can do the adjournment contingent on joining the actions since I have not yet filed a response on behalf of Dr. Gan.

- [8] On March 8, 2019, counsel for Drs. Javier and Gan wrote to plaintiff's counsel as follows:

I have the following instructions: 1) I consent to your proposed application to consolidate the Javier action with the Gan action; 2) if you confirm that you will consolidate the actions, I will consent to an adjournment of the Javier trial and to have it reset to June 22nd for nine days if that date is still available. If you think it will require more days, that is fine as well. I do not think it would make any difference as to whether the actions are consolidated or whether they are ordered to be heard at the same time with agreement that all documents in one action can be used equally in the other.

- [9] I note that the March 8, 2019 correspondence from defendants' counsel references a proposed application by the plaintiff to consolidate. However, plaintiff's counsel had made no such proposal. The only reference to consolidation in the correspondence up to this point in time was by defendants' counsel in his March 4, 2019 letter. Plaintiff's counsel had always spoken of adding Dr. Gan as a defendant to Action #1. Nevertheless, on March 11, 2019, plaintiff's counsel advised that he agreed in principle with the March 8 proposal and suggested that the trial date be adjourned:

I agree in principle with what you have set out below. I suggest we adjourn the trial now to secure the June 22, 2020 trial date (which is still available) and sort out the details in due course. We will draw up the paperwork.

- [10] The trial was adjourned on March 12, 2019, to June 22, 2020. The trial is to be a jury trial.
- [11] On March 20, 2019, a response was filed in Action #2. The response included a limitation defence.
- [12] On April 23, 2019, counsel for the defendants wrote to plaintiff's counsel inquiring when the actions would be joined and requesting that this be done sooner rather than later. He followed up on June 17, 2019, with a draft order to have the two actions heard at the same time.
- [13] On July 4, 2019, defendants' counsel wrote to plaintiff's counsel advising that it was his understanding the trial was adjourned "on the condition" that the two actions would be consolidated or joined. Plaintiff's counsel replied on July 15 advising that "the adjournment was not done with prejudice to my ability to bring" an application to add Dr. Gan as a defendant to Action #1.
- [14] On August 7, 2019, plaintiff's counsel wrote to defendants' counsel advising he would agree to consolidation if defendants' counsel agreed it would be without prejudice to an application to add Dr. Gan as a defendant to Action #1. On August 8, 2019, defendants' counsel replied that he agreed there was nothing preventing such an application:

I am not sure what you mean by without prejudice in this context. I agree that there is nothing to prevent you from bringing an application to add Dr. Gan as a defendant to the Javier Action once the Gan Action is consolidated with the Javier Action. However, the fact that a separate action exists against Dr. Gan and is consolidated with the Javier Action are relevant facts and would be admissible should you bring such an application.

ISSUES

- [15] The issue is whether the actions should be consolidated or whether Dr. Gan should be added as a defendant to Action #1.

- [16] The defendants submit that the actions should be consolidated or heard at the same time rather than adding Dr. Gan as a defendant to Action #1. They say that the Supreme Court Civil Rules require consolidation and further say that there was an agreement that the actions would be consolidated or heard at the same time.
- [17] The plaintiff submits that the commencement of Action #2 against Dr. Gan was always intended as a placeholder to stop the possible running of the limitation period and that it was always the plaintiff's intention to add Dr. Gan as a party to Action #1. The plaintiff further submits that there was no meeting of the minds such as to establish an agreement between counsel that the actions would be consolidated or joined.
- [18] It is worth noting that the reason for the different positions being taken by the parties is that the result could affect any possible limitation defence of Dr. Gan. If Dr. Gan is added as a defendant to Action #1, any such defence could be extinguished. However, if the actions are ordered tried together or consolidated, the limitation defence remains.

ANALYSIS

Was There an Agreement to Consolidate?

- [19] I will address first the issue of whether there was an agreement between counsel for the parties that the actions would be consolidated or heard at the same time. In my view the evidence does not establish any such agreement. Plaintiff's counsel throughout and repeatedly spoke of joining Dr. Gan as a defendant to Action #1. It was defendants' counsel that transmogrified the discussion to one of consolidation in his emails of March 4 and 8, 2019. Plaintiff's counsel was careless in failing to recognize that defendants' counsel had transformed the discussion. However, defendants' counsel was equally careless, if not more so, in the framing of his emails of March 4 and 8, 2019. He wrongly characterized the plaintiff's intended application as one for consolidation, when it was one of adding a party. I assume this mischaracterization was done inadvertently. Nevertheless, it shows that there was no consensus ad idem or meeting of the minds such that there was a binding agreement to consolidate the actions.

Is Consolidation Required by the Supreme Court Civil Rules?

- [20] Consolidation of proceedings is addressed in R. 22-5(8), which simply provides:
- (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.
- [21] The principles applicable to an application for consolidation are set out by Justice D.C. MacDonald in *Raymond James Investment Counsel Ltd. v. Clyne*, 2018 BCSC 720, at paras. 36-40 as follows:
- [36] In *Hui v. Hoa*, 2012 BCSC 1045 [Hui], Master MacNaughton (as she then was) outlined the law regarding joinders:

- [33] The law with respect to when two proceedings should be tried together was helpfully summarized by Master Shaw in *Egan v. ICBC*, 2010 BCSC 1042. Briefly, there are two questions which must be answered. The first involves considering whether the two proceedings involve common claims, disputes and relationships. As set out in *Merritt v. Imasco Enterprises Inc.*, (1992) 2 C.P.C. (3d) 275, that determination is made on a review of the pleadings.
- [34] The second question is whether the two proceedings are so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and expense. This question involves considering a number of factors including whether trial together will:
- a) create a saving in pre-trial procedures;
 - b) reduce the number of trial days;
 - c) seriously inconvenience a party by being required to attend part of a joined proceeding in which they may have little or no interest;
- [35] Other factors to be considered are whether:
- a) one of the proceedings is at a more advanced stage than the other;
 - b) trial together will result in a delay of the trial of one of the proceedings and the prejudice of that delay outweighing the potential benefits of trial together;
 - c) there is a risk of inconsistent findings on identical issues; and
 - d) one party might be deprived of their right to a jury trial.
- [37] Hui was relied on in *Liu v. Tsai*, 2017 BCSC 221 [Liu] at para. 2.
- [38] When considering joining actions, the court must determine whether the degree of commonality and intertwining of issues outweighs the prejudicial factors raised by the party opposing the order: *Simmonds v. The Corporation of the City of Victoria*, 2016 BCSC 951 at para. 25; *Liu* at para. 4.
- [39] An order for joinder does not require the applicant to prove that the commonality in issues and parties means that the disposition of one action will necessarily dispose of the issues in the other: *Liu* at para. 3; *Peel v. Western Delta*, 2003 BCSC 784 [Peel] at paras. 27-32.
- [40] Master Keighley has described the test as "will the order make sense in the circumstances": *Sohal v. Argitos*, 2010 BCSC 916 at para. 22.

[22] In summary, the determination involves: first, whether the two proceedings involve common claims, disputes and relationships; and second, whether the two proceedings are so interwoven as to make separate trials undesirable and fraught with problems and expense. Master Keighley described the test as "will the order make sense in the circumstances?"

[23] I have no hesitation in holding that the test for consolidations or hearing together is met in this case. The two actions involve the same plaintiff, the same surgery and the same damages. The same issues of fact and law are raised in both actions. If the two actions were allowed to proceed independently to separate trials, there would be the possibility of inconsistent verdicts and a waste of time and expense.

[24] This, however, is not the end of the matter. The real issue is whether Dr. Gan should be joined as a defendant to Action #1 as opposed to consolidating the two actions.

Should Dr. Gan be Added as a Defendant to Action #1?

[25] The addition of parties is addressed in R. 6-2(7), which reads as follows:

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

(a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

That, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[26] Setting aside for the moment any consideration of the limitation period issue, it is abundantly obvious that it is just and convenient that Dr. Gan should be added as a defendant under R. 6-2(7)(c) if not (b). The relief claimed against Dr. Gan is exactly the same as the relief claimed against Dr. Javer and the subject matter of the claim against Dr. Gan is the exact same as the subject matter of the claim against Dr. Javer.

- [27] The only submission of Dr. Gan in opposition to him being added as a defendant, aside from the submission a consolidation is preferable, is the delay and the alleged expiry of the limitation period. The approach to be applied where there is a joinder application and a possible limitation defence is set out in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 [John A. Nelson Architects], as follows at paras. 47 and 48:
- [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three-step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
 2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
 3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.
- [48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, 1987 CanLII 164 (BC CA), [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.

[28] The argument before me largely centred around which, if any, of the above four options should apply, which in turn depends on whether or not the limitation period has clearly expired. The plaintiff submits that it is clear there is no limitation defence and the first option applies. Dr. Gan submits that it is clear the limitation period has expired and that due to delay and prejudice, I should order the consolidation of the actions. Alternatively, Dr. Gan submits that the limitation issue cannot be determined on the evidence before me and option four ought to apply.

Has the Limitation Period Clearly Expired?

[29] The plaintiff submits that the evidence before me establishes that Dr. Gan's involvement did not become sufficiently known to the plaintiff until the examination for discovery on May 31, 2018, and therefore the limitation period could not expire until May 31, 2020, at the earliest. Dr. Gan responds that there were sufficient indications prior to the examination for discovery on May 31, 2018, to put the plaintiff on notice of the involvement of Dr. Gan. Dr. Gan points to a post-surgery appointment with Dr. Javer on April 27, 2013, where a second doctor was also in attendance, something the plaintiff acknowledged on his own examination for discovery but he was unsure of the name of the doctor present. Dr. Gan also points to the operating room record, which has a space for "assist" and which is filled out with a name that is, in my view, illegible. There is also a document entitled "OR record" which lists Dr. Javer as the surgeon in typed face and opposite a heading "Assistant" contains two handwritten names which are again, in my view, not particularly legible. Although one could say "E.C. Gan".

[30] In my opinion, it cannot be said that it is clear there is no accrued limitation defence. I am of this view primarily because there is no affidavit before me from the plaintiff stating that he was not aware of Dr. Gan's involvement prior to the examination for discovery of Dr. Javer. Also, based on his discovery evidence, it appears that he may have been aware that some doctor was assisting Dr. Javer.

[31] Further, in my opinion, it cannot be said that it is clear there is an accrued limitation defence. The various clinical records and reports are insufficient to establish the requisite knowledge on the part of the plaintiff of Dr. Gan's involvement. His discovery evidence is likewise insufficient.

[32] Considering all of the evidence relating to this issue, and there is not much direct evidence, I am not in a position to determine when the applicable limitation period commenced to run, and therefore I am not in a position to determine whether the limitation period has clearly run or not. Therefore, I must consider options three and four from John A. Neilson Architects.

Assuming the Limitation Period Expired, is it Nevertheless Just and Convenient to Add Dr. Gan?

[33] Option three from John A. Neilson Architects requires that I assume the limitation has expired and proceed to consider whether it is nevertheless just and convenient to add the proposed defendant and extinguish any limitation defence. The factors to consider are set out in *Letvad v. Fenwick*, 2000 BCCA 630, at para. 29 as follows:

[29] ...

- the extent of the delay;
- the reasons for the delay;
- any explanation put forward to account for the delay;
- the degree of prejudice caused by delay; and
- the extent of the connection, if any, between the existing claims and the proposed new cause of action.

Delay

[34] With respect to delay, the surgery was conducted in April 2013 and the spacer that had not been removed was discovered on June 27, 2015. The earliest therefore that the two-year limitation period could expire would be June 27, 2017, which is admitted by Dr. Gan.

[35] The plaintiff submits that the reasons for the delay were simply that the plaintiff and his counsel were unaware of Dr. Gan's involvement until the examination for discovery of Dr. Javer on May 31, 2018. However, there was a further delay between learning of Dr. Gan's involvement at the discovery and the November 2018 email. No explanation is offered for this delay. There was yet further delay after the November 2018 email, but I accept that some of this delay is attributable to awaiting a response from Dr. Javer's counsel, and when that response was not forthcoming quickly enough, Action #2 was commenced as a placeholder.

Prejudice

[36] With respect to prejudice, the prejudice suffered as a result of any unreasonable delay is to be assessed based on the length of the limitation period plus one year for service: *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 at para. 28. In other words, prejudice that occurred during this three-year period is not relevant to the analysis. In the circumstances of this matter, this means that any prejudice suffered up to June 27, 2018, is not relevant. It is noteworthy and a relevant factor that the examination for discovery of Dr. Javer was held on May 31, 2018, approximately one month prior to the expiry of this grace period.

[37] Importantly, Dr. Gan does not assert any prejudice other than what is presumed and the possible extinguishment of his limitation defence. On the other hand, the plaintiff submits he could suffer significant prejudice if Dr. Gan is not added as a party in that he could be entirely deprived of his cause of action against Dr. Gan. A similar balancing of prejudice was addressed by Justice Bowden in *Ferguson v. Dippenaar*, 2018 BCSC 434, which involved an

appeal of a master's order adding a second medical practitioner as a defendant more than three years after the expiry of the limitation period. Justice Bowden upheld the decision of the master holding that the plaintiff's prejudice outweighed the defendants', and that it was just and convenient to add the new defendant:

- [30] The Master also balanced the prejudice of the appellants being added at this late date with the prejudice which would be suffered by the plaintiff if he is unable to proceed with his claim against the appellants. At para. 50 of her reasons she stated:
- [50] A very important factor here to my mind is a comparison of the extent of the potential prejudice between the proposed defendants, and the plaintiff for the alleged delay in treatment, and the alleged resulting injury. The plaintiff will potentially be deprived of this very action in that regard if these proposed defendants are not joined.
- [31] In my view, the potential prejudice to the plaintiff of losing the opportunity to ask a court to consider his claim against the appellants, which is potentially significant, is much greater than the prejudice to the appellants from losing "a windfall opportunity to avoid the issue altogether. Their respective situations may be precisely balanced in purely financial terms, but not as a matter of justice. A right to seek justice cannot fairly be equated with a right to cut short the search without an answer." *Moldovan v. Republic Western Insurance Company*, 2011 BCCA 418 at para. 35.
- [38] As in *Ferguson*, I consider that the prejudice to the plaintiff of possibly losing his claim against Dr. Gan far outweighs the possible prejudice to Dr. Gan of eliminating a possible limitation defence.

The extent of connection

- [39] The final factor from *Letvad* is the extent of connection between the claims and the causes of action. This factor heavily favours adding Dr. Gan as a defendant to Action #1. The claims against Dr. Gan and Dr. Javer are identical, as are the causes of action.

Other considerations

- [40] One further factor Dr. Gan submits that ought to be considered in the balancing of what is just and convenient is the fact of the existence of Action #2. He submits that because of Action #2, the plaintiff will not suffer prejudice if Dr. Gan is not added to Action #1. I do not accept this submission. I accept that Action # 2 was commenced as a placeholder or out of an abundance of caution. It was always intended by the plaintiff that Dr. Gan would be added as a defendant to Action #1, something that was repeatedly made clear in the emails between counsel.
- [41] I further accept that the commencement of Action #2 was a prudent course of action by the plaintiff, given it was unclear whether the limitation period had expired or when it might expire. A party should not be penalized for having adopted such a prudent course of action

by being in a worse position than a party who did nothing and simply allowed a possible limitation period to expire. In my view the commencement of Action #2 is not a relevant factor weighing against the plaintiff in the balancing of prejudice or what is just and convenient.

- [42] In my view, considering the extent of the delay, the reasons and explanations for the delay and most importantly, the lack of any actual prejudice to Dr. Gan, it is just and convenient to add Dr. Gan as a defendant to Action #1, notwithstanding that this will eliminate any limitation defence that he may have. In view of this finding, I need not consider option four from John A. Neilson Architects.
- [43] Further, this finding is dispositive of the applications for the actions to be consolidated or heard together. Considerations of justice and convenience dictate that Dr. Gan be added as a defendant to the existing Action #1, rather than there be consolidation. This follows from the factors I have analyzed above, but I would add that the fact that this matter is to be heard by a jury also militates in favour of adding Dr. Gan as a defendant to Action #1. The pleadings and issues will be significantly more simplified and comprehensible if he is added as a defendant to the existing action.
- [44] Therefore, the application to add Dr. Gan as a defendant to Action #1 and to file the amended statement of claim attached to the notice of motion is therefore allowed. The applications to consolidate Actions #1 and # 2 are dismissed.

[SUBMISSIONS ON COSTS]

- [45] THE COURT: All right. The costs of these applications shall be to the plaintiff.

"Giaschi, J."

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