

CANADA / JUDGMENT

## Purewal v. Panganiban

2023 BCSC 1581

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1581 Purewal v. Panganiban

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Purewal v. Panganiban,

2023 BCSC 1581

Date: 20230824

Docket: M196963

Registry: Vancouver

Between:

Kumandeep Purewal

Plaintiff

And:

Julius P. Panganiban, Mohammad Afzal Bashir,

and Roy Qizheng Yu

Defendants

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

N. J. Hartney (August 15, 2023)

E. Lay (August 24, 2023)

Counsel for the Defendants:

J. S. L. Lau

Place and Date of Hearing:

Vancouver, B.C.

August 15, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 24, 2023

## Introduction

- [1] THE COURT: The plaintiff claims for damage, loss, and expense arising from a multi-vehicle motor vehicle accident which occurred on June 13, 2018 (the "2018 Accident") on the Alex Fraser Bridge in or near Delta, BC. The defendants admit liability.
- [2] The plaintiff applies to:
- a) extend time to strike the jury notice; and
  - b) strike the jury notice and have trial proceed by judge alone.
- [3] The defendants oppose the relief sought.

## Background

- [4] The plaintiff started this action on June 25, 2019. Injuries alleged include headaches and injuries to the head, neck, shoulders, back, emotional and psychological injuries, chronic pain, chronic fatigue and sleep disruption. She alleges the injuries have caused and continue to cause her pain and suffering, loss of enjoyment of life, permanent physical disability, loss of physical, mental and emotional health, loss of earnings past and prospective, loss of competitive advantage, loss of opportunity to earn income, loss of income-earning capacity and shortened working life.
- [5] Counsel characterizes the plaintiff's injuries as serious. She was 25 years of age at the time of the 2018 Accident. She had just begun a career as an insurance broker. She is now 30 years of age. Counsel asserts she is likely permanently disabled from competitive employment. She is currently receiving social assistance.

- [6] The plaintiff was previously involved in an accident on July 10, 2016 (the "2016 Accident") in Edmonton, Alberta. The plaintiff retained Alberta counsel to pursue a claim for compensation for the resulting injuries, which included to her neck, shoulders, back, and headaches. On January 14, 2023, Alberta counsel settled her claim for \$139,142.52, inclusive of costs and disbursements.
- [7] In the present action, defendants' counsel requested production of Alberta counsel's file for the 2016 Accident. That was voluntarily produced. Included in the materials produced was an expert report commissioned by plaintiff's Alberta counsel from a Physiatrist, Dr. Gihan Perera dated September 1, 2021. His report describes the injuries which the plaintiff suffered in the 2016 Accident as being relatively serious and chronic in nature, with ongoing impact on her functional implications and work capacity. He opines that her injuries from the 2016 Accident were likely exacerbated by the 2018 Accident. He says her injuries from the former accident were chronic and unresolved when the latter accident occurred.

### **Procedural History.**

- [8] On June 25, 2019, the plaintiff filed her notice of civil claim.
- [9] On February 3, 2021, the defendants filed their response to civil claim. Liability for the 2018 Accident was admitted. The defendants denied that the plaintiff had suffered any injury or loss and say any injury or loss was attributable to previous accidents.
- [10] On August 9, 2022, the plaintiff was examined for discovery.
- [11] On August 14, 2022, plaintiff's counsel filed a notice of trial returnable August 14, 2023, for five days.
- [12] On May 30, 2022, defendants' counsel served a notice requiring trial by jury. Prior to the 84-day deadline for serving expert reports, plaintiff's counsel served reports from the following:
- a) Dr. Simran Shergill, Physiatrist;
  - b) Dr. Pieter Van Den Berg, Vocational Consultant;
  - c) Dr. Alina Webber, Neurologist;
  - d) Dr. Shao-Hua Lu, Psychiatrist; and
  - e) Mr. Nima Nassouti, Occupational Therapist.
- [13] Prior to the 84-day deadline, defendants' counsel served the following expert reports:
- a) Dr. Trevor Lashyn, Physiatrist;
  - b) Dr. Gregory B. Walker, Neurologist; and
  - c) Dr. Matt Gregson, Occupational Therapist.

- [14] On July 5, 2023, a trial management conference was held before me. The August 14, 2022 trial date was adjourned due to insufficient time reserved. Counsel were directed to set a new, mutually convenient date for a suggested twelve-day trial. On or about the same day, the parties were extremely fortunate and able to reserve a new trial date of September 5, 2023, for twelve days.
- [15] On July 9, 2023, the plaintiff served an expert report of Mr. Curtis Peever, Economist. This was commissioned after plaintiff's counsel learned at the TMC that the defendants had paid jury fees.
- [16] On July 10, 2023, defendant's counsel wrote to plaintiff's counsel serving Dr. Perera's report purportedly pursuant to Rule 11-6(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [17] That same day, plaintiff's counsel objected to Dr. Perera's report on the basis that it had been served late, it did not comply with Rule 11-6 and because it was more prejudicial than probative. Plaintiff's counsel indicated they would object to any reference to the earlier Alberta litigation as inflammatory and highly prejudicial before the jury.
- [18] My understanding is that the concern regarding non-compliance with Rule 11-6 relates to the absence of a Rule 11-2(1) and (2) certification in Dr. Perera's report stating he was aware of his duty to assist the court and not to be an advocate for any party, that he had made his report in conformity with that duty and if called upon to give oral or written testimony, he would give it in conformity with that duty.
- [19] On July 14, 2023, plaintiff's counsel wrote advising he also objected to Dr. Perera's report on the basis that a jury cannot possibly understand how to properly (if at all) deduct the 2016 Accident settlement amount from any award for the 2018 Accident, including but not limited to determining what heads of damage are reflected in the global settlement figure, how the Alberta's Minor Injury Regulation, B.C. Reg. 234/2018 are reflected in the settlement, and whether and how any portion of the settlement should be deducted from any award in the current action.
- [20] On July 19, 2023, a new notice of trial was filed returnable September 5, 2023, for twelve days. That same day, defendant's counsel filed a notice requiring trial by jury. On July 20, 2023, Sheriff Services confirmed a receipt of jury fees from the defendants.
- [21] On July 21, 2023, defendant's counsel wrote serving a supplemental expert report of Dr. Trevor Lashyn (Physiatrist) in which he reviews Dr. Perera's report and amends his opinion to state that the plaintiff's injuries from the 2018 Accident were an exacerbation of injuries she received in the 2016 Accident. This included the following:

It is my (amended) opinion that the June 18, 2018 collision caused an exacerbation of the cervical spine musculoligamentous injury, thoracic spine musculoligamentous injury and lumbosacral spine musculoligamentous injury with SI joint pain syndrome. Considering the documented psychosocial dysfunction following the 2016 collision, it is my impression that the chronic pain syndrome was present prior to the 2018 collision. As such, the June 2018 collision constituted an exacerbation of the pre-existing chronic pain syndrome.

[22] The defendants have served the following reports after the 84-day deadline:

- a) response report of Dr. Kevin Turnbull, Economist;
- b) response report of Dr. Gregory Walker, Neurologist;
- c) response report of Dr. Trevor Lashyn, Physiatrist;
- d) response report of Mr. Matt Gregson, Occupational Therapist;
- e) response report of Dr. Lee Rasmussen, Psychiatrist; and
- f) report of Dr. Gihan Perera, Physiatrist.

[23] Accordingly, in total the plaintiff is relying on six expert reports, the defendants on nine, for a total of fifteen.

[24] On August 2, 2023, a second TMC was held before Justice Doyle. Trial is set for September 5, 2023, for twelve days with a jury.

#### Applicable Law

#### Striking Jury Notice

[25] Rule 12-6(3) addresses requirements for having a trial heard with a jury. This includes filing and serving a notice requiring trial by jury and paying jury fees. Rule 12-6(3) reads as follows:

#### Notice requiring jury trial

- (3) Subject to Rule 15-1 (10) and subrules (2) and (4) of this rule, a party may require that the trial of an action be heard by the court with a jury by doing the following:
  - (a) within 21 days after service of the notice of trial but at least 45 days before trial,
  - (i) filing a notice in Form 47, and
  - (ii) serving a copy of the filed notice on all parties of record;
  - (b) at least 45 days before trial, paying to the sheriff a sum sufficient to pay for the jury and the jury process.

[26] Rule 12-6(5) provides that a party on whom a notice requiring trial by jury has been served may apply within seven days after service for an order that the trial or part of it be heard by the court without a jury. Rule 12-6(5) reads as follows:

### **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, or
  - (b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).

[27] In a personal injury case, there is a presumptive right to a trial by jury, and it is only where a judge is satisfied, under Rule 12-6(5)(a) criteria, that the issues cannot be tried fairly by a jury that the jury notice should be struck. The onus is on the applicant and is not easily satisfied. See *MacPherson v. Czaban*, 2002 BCCA 518, at para. 17.

[28] In *Rados v. Pannu*, 2015 BCSC 453, at paras. 34-35 and 38 (approved on appeal at 2015 BCCA 459 at para. 4), Justice Fitch noted there is a two-step analysis under subrule (5)(a):

[34] Under Rule 12-6(5)(a), a two-step analysis is required. First, the court must determine whether the issues in the case require a prolonged examination of documents, scientific investigation, or are otherwise of an intricate or complex character. The fact that lengthy materials are likely to be filed does not necessarily mean that a prolonged examination of them is required. The fact that there will be a considerable amount of evidence led does not necessarily make the issues intricate or complex. Issues may be intricate or complex if, for example, the judge would experience difficulty in framing questions for the jury. It is the character of the issues that is the focus of the inquiry. The number of issues in play is not necessarily an accurate gauge of intricacy or complexity: *MacDonald v. Smith* (1983), 48 B.C.L.R. 285 (B.C.S.C.) at para. Finally, complexity must be assessed cumulatively, with the whole of the trial in mind, and with an appreciation of the extent to which factual findings will impact on the weight that may be given to other expert reports and guide the assessment of other issues, including the quantification of damages. As Chief Justice McEachern observed in *MacDonald v. Smith*, while it may be the case that individual issues viewed in isolation could be tried conveniently with a jury, attention must also be paid to

difficulties that are likely to arise from the interaction of and between different issues. Put differently, where multiple issues are to be considered, the interplay between otherwise relatively uncomplicated issues can make them intricate or complex in nature.

- [35] If the court finds that prolonged examination of documents or a scientific investigation is necessary, it must consider the second part of the test, which is whether that examination can be made conveniently with a jury. Similarly, if the court determines that the issues are of an intricate or complex character, the court must proceed to determine whether the trial should be heard without a jury. In either event, the second stage of the inquiry obliges the court to exercise its discretion, the amplitude of which is somewhat broader when a finding has been made that the issues in the case are intricate or complex: *Nichols v. Gray* (1978), 9 B.C.L.R. 5 (C.A.) at p. 14.
- [38] There are a multitude of factors that are capable of shaping the exercise of discretion in an individual case, including:
- the anticipated length of the trial;
  - the number of experts to be called;
  - the volume of expert evidence;
  - the nature and character of the expert evidence;
  - the extent to which there are conflicts in the expert evidence;
  - 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;
  - the extent to which the case necessarily involves reference to unfamiliar medical terminology;
  - the number of issues to be resolved by the jury;
  - the character of those issues; and
  - complexities that may arise as a consequence of the interaction between issues.

### **Extension of Time**

- [29] The plaintiff has applied for an extension of time to file its application to strike the jury notice. Rule 22-4(2) allows the court to extend or shorten any time or period of time provided for in the rules:

### **Extending or shortening time**

- (2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.

- [30] The notice of trial (filed by the plaintiff) and notice requiring trial by jury (filed by the defendants) were both filed on July 19, 2023. Assuming they were both served on the same day that they were filed, the seven-day period for the plaintiff to apply to strike the jury notice would have expired July 26, 2023. The plaintiff's application was filed July 25, 2023, but was not heard until August 11, 2023.
- [31] In *Bartram v. GlaxoSmithKline Inc.*, 2016 BCSC 1409, at para. 6 the court noted that counsel have sensibly adopted the practice of scheduling the hearing of an application to strike the jury notice on a date relatively close to trial by which time the issues are more clearly defined than they would be if it were to be heard earlier.
- [32] In this case, it is appropriate to extend the time to apply given the overall chronology of how this particular trial date came to pass. The application for extension of time to apply to strike the jury notice is granted.

### **Plaintiff's Position - Striking Jury Notice**

- [33] The plaintiff's primary argument focused on subrule (5)(a)(ii), that the jury notice should be struck on the basis that the issues are of an intricate and complex character, due to (a) the possibility that some or all of the plaintiff's injuries stemming from the two accidents may be found to be indivisible and (b) appropriate treatment of how to account for the settlement reached in the 2016 Accident is beyond what the jury would be able to handle.
- [34] Counsel argues that the jury cannot be expected to understand the concept of indivisibility, and it cannot possibly undertake to deduct heads of damage from the settlement of the 2016 Accident from any global amounts assessed in the present action. This latter point flows from the 2016 Accident settlement being for a lump sum rather than being broken down into individual amounts for various heads of damage. Counsel argues that such an approach would potentially require the jury to study the Minor Injury Regulation, Alta Reg 123/2004 and determine whether the plaintiff suffered a "minor injury" as defined in that regulation, whether and how much of the Alberta lump-sum settlement should be allocated to various heads of damage and how much, if any amount, ought to be deducted from any global damage assessment in the present action.
- [35] Counsel also notes there are total of 15 expert reports comprising about 500 pages. This will require the jury to carry out a prolonged examination of complex medical evidence.

### **Defendant's Position - Striking Jury Notice**

- [36] The defendants argue that sub-rule (5)(a)(i) does not apply to this case. Liability has been admitted. The injuries arising out of the accident appear to be primarily pre-existing chronic pain in nature. There is unlikely to be a prolonged examination of documents or accounts, or a scientific or a local investigation. The collective size of the expert reports is misleading because they each contain curriculum vitae, raw data and instruction letters. The substantive opinion in each report is less than 20 pages on average. They say a jury is

particularly well suited to determine facts of the kind in issue here and of understanding the evidence and retaining that understanding until the end of the trial, which is only 12 days in length.

- [37] Alternatively, if the court concludes that a prolonged examination is required, the onus lies on the plaintiff to provide a reason why such an examination would be inconvenient. The defendants say the jury is particularly well suited to determine facts of this case and is capable of understanding the evidence and retaining that understanding until the end of trial. There is nothing in the case that cannot be conveniently tried by a jury.
- [38] They also argue that sub-rule (5)(a)(ii) that issues are of an intricate or complex nature does not apply. This action involves a single accident. Liability has been admitted. The plaintiff has alleged multiple injuries, some of which the defendants will argue are pre-existing from the 2016 Accident, which claim was settled January 14, 2023. There is no significant complexity to the issues concerning the plaintiff's injuries. The jury only needs to consider what the plaintiff's condition was at the time of the accident based on the evidence presented in order to fairly and reasonably assess the plaintiff's damages. The defendants say that loss of earning capacity and loss of future care appear to be the most substantial components of the plaintiff's claim. They rely on *Cliff v. Dahl*, 2012 BCSC 276, at para. 40 for the proposition that a jury is particularly well suited to the task of determining the evidentiary foundation for an award of damages under the headings of future loss of earning capacity and cost of future care.
- [39] The defendants say that none of the evidence before the jury is sufficiently novel or complex to warrant striking the jury notice.

## Analysis

- [40] The plaintiff relies on sub-rule (5)(a)(ii), arguing the jury notice should be struck on the basis that the issues are of an intricate and complex character due to the possibility that some of the plaintiff's injuries arising from the 2016 Accident and 2018 Accident may be found to be indivisible. Counsel also focuses on practical difficulties the jury would encounter in trying to separate out appropriate settlement amounts for the various heads of damage from the lump-sum settlement figure for the 2016 Accident. It is argued that the jury may focus on deducting the entire lump sum rather than appreciating the complexities of notionally dividing the lump sum amongst the various heads of damage involved in the 2016 Accident claim.
- [41] Neither party was able to refer me to a previous decision in which indivisibility played a significant role in an application to strike a jury notice.
- [42] The seminal case in BC dealing with indivisible injuries is *Bradley v. Groves*, 2010 BCCA 361. See paragraphs 20 and 32-34.

- [43] In *Lundgren v. Taylor*, 2023 BCSC 612, at paras. 66-68, Justice Chan summarized divisible and indivisible injuries:
- [66] Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes: *Bradley v. Groves*, 2010 BCCA 361 at para. 20.
- [67] As the plaintiff has been involved in three successive motor vehicle accidents, the Court must determine whether the injuries from the 2012 Accident, the 2016 Accident and the 2018 Accident were divisible or indivisible. For indivisible injury caused by multiple tortfeasors, the tortfeasors are jointly and severally liable: *Athey*. However, the rule against double recovery may come into play where one of these actions have resulted in a settlement: See *Ashcroft v. Dhaliwal*, 2008 BCCA 352.
- [68] Whether injuries are divisible or indivisible is a finding of fact based on the evidence. Where there is evidence that shows a plaintiff's injuries have plateaued or become chronic, it is possible to find the injuries from an earlier accident to be divisible from injuries suffered in subsequent accidents: See *Schnurr v. Insurance Corporation of British Columbia*, 2015 BCSC 1630 at paras. 169-172 and *Uppal v. Judge*, 2016 BCSC 642 at paras. 84-87.
- [44] She also summarized law of causation and pre-existing conditions at paragraphs 60-65. That excerpt is lengthy, so I will not repeat it here.
- [45] I am unable to agree with plaintiff's submission that it would be impossible for a jury to understand the concept of indivisibility. Indivisibility is an issue which comes up from time to time in personal injury claims, particularly those involving multiple accidents. Properly instructed by the trial judge, the jury should be able to understand and decide whether certain injuries are properly characterized as divisible or indivisible. If the former, the jury should be well capable of deciding causation and whether and to what extent there were conditions which pre-existed the 2018 Accident. If the latter, it would be a matter of the jury having to assess damages for injuries involved in both accidents. In any event, the trial judge will be in a far better position, once the case is in, to decide whether or not they are able to effectively instruct the jury.
- [46] I also do not agree that the jury would be in a substantially less favourable position to decide how to deal with the appropriate deductions for notional heads of damage included in the lump-sum settlement of the 2016 Accident. If the plaintiff wishes to make arguments regarding allocation of the lump sum amongst various heads of damage, regardless of whether it is a jury or judge alone trial, it will be necessary for the plaintiff to tender evidence regarding the claims advanced in the plaintiff's 2016 Accident claim. Such an assessment cannot be made in the absence of evidence regarding the claims made and settlement achieved for the 2016 Accident. There is no reason to believe a jury would be unable to effectively assess such evidence. In any event, the evidence before me on this application is limited to Dr. Perera's report, the Statement of Claim in the Alberta action, and the General Release from the settlement. These are not a sufficient basis to conclude a jury

would be unable to address issues arising from the 2016 Accident and settlement.

[47] I also do not agree that the volume of expert reports in this case has reached the level where it will result in such a prolonged examination that it cannot be conveniently made with a jury. The key opinion portions of the reports are not exceptionally voluminous. The parties have agreed twelve days is adequate to complete the trial with jury. That is not inordinately long for a jury trial.

[48] In all the circumstances, the plaintiff has not persuaded me that this is an appropriate case in which to strike the jury notice. The application is dismissed.

[49] The defendants have been successful and are entitled to costs of the application in any event of the cause.

"Master Bilawich"

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