

CANADA / JUDGMENT

Sidhu v. Hiebert

2020 BCSC 183

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 183 Sidhu v. Hiebert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Hiebert,

2020 BCSC 183

Date: 20200214

Docket: M082472

Registry: Vancouver

Between:

Arshdeep Singh Sidhu

Plaintiff

And

Jan Abram Hiebert, Balwinder Kaur Sidhu, Rajvinder Singh Sidhu,

Surinder Singh Rattan, Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc., Abbotsford Nissan Ltd.

Defendants

And

Insurance Corporation of British Columbia, Jan Abram Hiebert,

Balwinder Kaur Sidhu, Rajvinder Singh Sidhu, Surinder Singh Rattan,

Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc. and Abbotsford Nissan Ltd.

Third Parties

Before: The Honourable Madam Justice Forth

Reasons for Judgment

on Application to Strike Jury Notice

Counsel for the Plaintiff:

M. J. Slater Q.C.

S. Jaworski

Counsel for the Defendants and Third Parties, Nissan Canada Inc., Nissan Motor Co., Ltd., Nissan North America, Inc., and Abbotsford Nissan Ltd.:

M. Parrish

G. McDonell

Counsel for the Defendants and Third Parties, Balwinder Kaur Sidhu and Rajvinder Singh Sidhu:

L. Dineley

Counsel for the Defendant and Third Party, Surinder Singh Rattan:

P. Miller

Counsel for the Third Party, Insurance Corporation of British Columbia:

D. D. Nugent

Place and Date of Hearing:

Vancouver, B.C.

February 3, 5, and 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 14, 2020

Introduction

- [1] The defendants, Nissan Canada Inc., Nissan Motor Co. Ltd., Nissan North America, Inc., and Abbotsford Nissan Ltd. (collectively, "Nissan" or "the Nissan defendants"), apply for an order pursuant to R. 12-6(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, that the trial of this action be heard without a jury. The defendant, Surinder Singh Rattan, supports Nissan's application.
- [2] The plaintiff, Arshdeep Singh Sidhu, opposes the application. He is supported by the defendants, Balwinder Kaur Sidhu and Rajvinder Singh Sidhu, and the third party, the Insurance Corporation of British Columbia ("ICBC").
- [3] The underlying action (the "Action"), together with B.C. Supreme Court Action No. M125363, (collectively, the "Actions"), are scheduled to be heard in a 73-day trial beginning on March 23, 2020. The Actions involve the following claims:
- a) a motor vehicle tort claim against the defendants Jan Abram Hiebert, Balwinder Kaur Sidhu, and Rajvinder Singh Sidhu relating to a motor vehicle accident on March 31, 2008 (the "Collision");
 - b) a product liability claim against the Nissan defendants relating to alleged negligence in the design, manufacture, distribution, and sale of the 2006 Nissan Pathfinder vehicle involved in the Collision;
 - c) a social host tort claim against the defendant Surinder Singh Rattan relating to the alleged negligence of Rattan as social host of the defendant Hiebert prior to the Collision; and
 - d) a motor vehicle accident tort claim against the defendants, Robert Vivier, Williams Roofing & Drainage Ltd., Rajvinder Singh Sidhu, and Balwinder Kaur Sidhu, in a second motor vehicle accident on April 15, 2011 (the "Second Collision").
- [4] I have been the judicial management and trial judge assigned to the Actions since June 2017.
- [5] Nissan argues that the Actions should not be tried before a jury because the issues require a prolonged examination of documents and a scientific investigation, neither of which can be made conveniently with a jury, and because the issues are of an intricate or complex character.
- [6] The plaintiff argues that the examination of documents and factual investigations can be done conveniently with a jury, that the issues are simple to understand, and that the time and cost involved in preserving the plaintiff's right to a jury trial is proportionate to the amount involved in the Actions.
- [7] For the reasons that follow, I grant Nissan's application and order that the trial of this action be heard by judge alone.

Background Facts and Issues

- [8] The Collision that underlies the Action occurred on March 30, 2008, when the plaintiff was nine years old. He was seated in the rear, driver-side seat of a 2006 Nissan Pathfinder (the "Pathfinder") owned by his father, Rajvinder Singh Sidhu, and being driven by his mother, Balwinder Kaur Sidhu. The Pathfinder was struck by a vehicle driven by the defendant Hiebert, who had been drinking alcohol at a party hosted by the defendant Rattan prior to the Collision.
- [9] The plaintiff is a ventilator-dependent quadriplegic as a result of the injuries he suffered in the Collision. How and why those injuries occurred are key issues to be resolved at trial.
- [10] The plaintiff concedes that he was wearing his seatbelt improperly at the time of the Collision, although the exact manner in which he was wearing it, and why, are in dispute. The plaintiff says that he had the lap belt bucked and was wearing the shoulder belt over his right shoulder instead of his left shoulder, as it was designed to be worn. He says the reason he was wearing his seatbelt this way was that it did not fit him properly and was uncomfortable because it touched his face and neck. Nissan says that the plaintiff's lap belt was not buckled. As the plaintiff has no memory of how he was wearing his seatbelt, this finding of fact will be the result of inferences made from circumstantial evidence, largely with the support of expert opinion evidence.
- [11] The plaintiff alleges that his injuries were the result of a defect in the Pathfinder's seatbelt. He says that Nissan installed seatbelts in the Pathfinder knowing they did not fit children and were likely to cross their face and necks, causing discomfort, which in turn caused children to wear the seatbelt improperly and expose them to increased risk in the event of an accident. The plaintiff says that Nissan knew or ought to have known of this defect, but negligently failed to install countermeasures to improve the fit and prevent misuse. In particular, he says that Nissan should have designed, manufactured, and/or installed a seatbelt adjustment device called a "comfort guide" and a seatbelt retraction mechanism called a "pretensioner". The plaintiff alleges that if these devices had been incorporated into the Pathfinder, the plaintiff would have worn his seatbelt properly and his injuries would have been avoided or greatly reduced.
- [12] The plaintiff also alleges that Nissan negligently failed to warn purchasers and users of the Pathfinder of the dangers with respect to the seatbelt defect.
- [13] The remainder of the plaintiff's claims in the Action include:
- a) claims against the defendant Hiebert for causing the Collision by driving too fast while impaired and failing to stop at a stop sign;
 - b) claims against the defendant Rattan as the social host of the party at which the defendant Hiebert had been drinking prior to the Collision;

- c) claims against his mother, Balwinder Kaur Sidhu, for permitting him to misuse his seatbelt; and
 - d) claims against his father, Rajvinder Singh Sidhu, for vicarious liability as owner of the Pathfinder.
- [14] At the hearing of this application, counsel informed that ICBC will seek to amend its response to civil claim to admit that the Collision was caused by the negligence of the defendant Hiebert. The remainder of the defendants contest liability. In particular, Nissan denies all of the allegations against it on the basis that the design of the Pathfinder and the seatbelt were reasonably safe and the plaintiff's discomfort and decision to remove the seatbelt were unrelated to the seatbelt design and manufacture. It says that the plaintiff's injuries were caused by:
- a) his own negligence, in failing to properly wear the seatbelt;
 - b) his parents' negligence, in failing to ensure his seatbelt was properly adjusted and buckled;
 - c) his mother's negligence, in allowing him to improperly wear the seatbelt;
 - d) the defendant Hiebert, for driving while impaired and running a stop sign immediately before the Collision; and
 - e) the defendant Rattan, for overserving the defendant Hiebert and allowing him to drive while impaired.
- [15] Nissan has further raised an issue whether the conduct of the plaintiff's mother, in giving the plaintiff permission to move the seatbelt, is a novus actus interveniens severing the chain of causation from any alleged defect in the seatbelt or a failure to warn.
- [16] The defendants have brought third party claims against each other. ICBC has been added as a third party pursuant to the provisions of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 because it denies liability to indemnify the defendant Hiebert as a result of his breach of the statutory conditions of his insurance policy.

General Principles

- [17] Under R. 12-6(5)(a) (the "Rule"), the court may strike a jury notice and order that the trial be heard by judge alone on any of the following grounds:
- (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.

- [18] The plaintiff has a prima facie right to have his case tried by a jury. It is a substantive right that should not be taken away without cogent reasons: *Cliff v. Dahl*, 2012 BCSC 276 at para. 20. The onus is on the applicant to satisfy the court that it should use its discretion to order that the trial proceed by judge alone. The case law recognizes this is a heavy burden that is not easily satisfied: *Cliff* at para. 28; *Rados v. Pannu*, 2015 BCSC 453 at para. 30 [*Rados BCSC*], *aff'd* 2015 BCCA 459 at para. 22 [*Rados BCCA*].
- [19] The court's exercise of discretion is premised on the understanding that juries are informed, intelligent, and capable of assessing properly presented evidence, even in a long trial with difficult legal questions: *Gulamani v. Chandra*, 2009 BCSC 1042 at para. 43. The collective education and life experience of jurors means that a jury's ability to evaluate, analyze, and reason in the cases before them "must be, with rare exception, at least equal to that of any single individual": *Cahoon v. Brideaux*, 2010 BCCA 228 at para. 4.
- [20] The Court of Appeal in *Cochrane v. Insurance Corp. of British Columbia*, 2005 BCCA 399 at para. 23, endorsed a two-part test under the former version of the Rule, which corresponds to paragraphs (i) and (ii) of the current Rule. First, the court must decide whether, as a matter of fact on the basis of the evidence presented: (1) the issues require prolonged examination of documents or accounts, (2) the issues require a scientific or local investigation, or (3) the issues are of an intricate or complex character. Second, if one of these findings is made, the court must decide whether it ought to exercise its discretion to strike the jury notice.
- [21] If the finding is that the issues require a prolonged examination of documents or require a scientific or local investigation, the judge's discretion must be exercised in relation to the question of whether such an examination or investigation can be made conveniently with a jury.
- [22] If the finding is that the issues are of an intricate or complex character, the discretion is exercised with respect to the broader question of whether the trial should be heard by judge alone: *Rados BCCA* at paras. 7-8. Although it was not addressed by the Court of Appeal in *Cochrane*, it is clear from the structure of the Rule that this broader question also guides the exercise of discretion with respect to the proportionality ground in paragraph (iii).
- [23] In my view, Nissan has met its burden of demonstrating that the issues in this case require a prolonged examination of documents and a scientific investigation that cannot be made conveniently with a jury, and that the issues are of an intricate or complex character, such that I should exercise my discretion to strike the jury notice. Given these findings, and since Nissan does not rely on it, I will not consider the proportionality ground.

Will the issues require a prolonged examination of documents?

Nissan's Position

- [24] Nissan submits that there will be extensive documents in this case. Although the parties have yet to propose lists or documents for a common book of documents at trial, the parties' lists of documents, the plaintiff's notice to admit, and the parties' instructing letters and related indices of documents for their experts indicate that the documentary exhibits at trial will be voluminous and require prolonged investigation.
- [25] Nissan's counsel estimates that the documents marked as exhibits at trial will be roughly 10,000 to 15,000 pages. This estimate is based primarily on the parties' expert reports and the instructing letters and documents relied upon by the experts in their reports, but also includes selected documents relating to the Pathfinder's design, testing and documents relied upon by the plaintiff relating to the United States National Transportation Safety Board recommendations.
- [26] Nissan submits that these documents will require prolonged examination. It points to the fact that the plaintiff's negligent design claim relies upon Nissan's knowledge of literature on risks relating to child restraints and safety defects in the Pathfinder's seatbelt spanning a period of over 30 years. Nissan will be relying on extensive documents relating to its design, testing, and certification in its defence.
- [27] With respect to the expert evidence, Nissan points to the extensive factual assumptions and documents upon which the experts base their opinions. Nissan objects to the factual assumptions and documents forming the basis of the plaintiff's expert opinions, and it anticipates that the nature and admissibility of the information in these documents will be a highly contested issue at trial. Furthermore, the scientific literature relied upon by the experts is highly contested and will require counsel to put the authoritative passages to the experts in direct examination, followed by cross-examination by the opposing counsel. Nissan submits that this procedure will not only require prolonged examination of documents, but also an investigation into scientific issues.

The Plaintiff's Position

- [28] The plaintiff submits that prolonged examination of documents is not necessary in this case. Many of the issues will be dealt with primarily through viva voce evidence and will not be document intensive. While the volume of documents exchanged by the parties may be large, the number of documents that Nissan says the trier of fact will have to examine, and the nature of the examination required, is speculative.
- [29] The plaintiff submits that only select key documents need to be provided to the jury, and that only particular pages of those documents will need to be examined in detail. For documents of a more technical nature, the jury will have the benefit of expert opinion to explain and synthesize the concepts.

Analysis

- [30] I find that this case will involve a prolonged examination of documents, and that the volume of those documents is likely to be extensive. While I accept that the likelihood of lengthy materials being filed does not necessarily mean that a prolonged examination of them will be required, the nature of the issues in this case are such that prolonged examination will be necessary.
- [31] I do not accept that Nissan's estimate of the volume of documents that are likely to be entered as exhibits at trial is purely speculative. Counsel has provided a clear basis for the estimate that is supported by the key issues raised in the case.
- [32] In *Cochrane* at para. 25, the Court of Appeal held that judges may consider the number and character of documents, as well as the complexity of the matters dealt with in the documents and their legal consequences, to determine whether a prolonged examination of documents would be required at trial.
- [33] At this stage, 100 expert reports have been served, authored by 55 different experts. All of the experts have been requested for cross-examination. Like in *Campbell v. McDougall*, 2011 BCSC 1864 at para. 14, the jury will be faced with the prospect of examining, considering, digesting, and retaining information from these experts. The parties' expert reports exceed 2,500 pages, and the instructing letters, factual assumptions, and lists of documents are of a similar length. The specialities of the experts include: paediatrics, general medicine, urology, occupational therapy, psychiatry, architecture, physiotherapy, vocational therapy, economic actuarial analysis, accounting, epidemiology, physiatry, collision analysis, blood alcohol analysis, injury biomechanics, accident reconstruction, occupant kinematics, occupant crash protection, ergonomics, occupant restraint system performance, vehicle inspection, electronic data recorder ("EDR") analysis, life expectancy, and radiology.
- [34] I accept that the documents in this case will be voluminous, of a complex nature, and of great consequence to the analysis with respect to the plaintiff's claims such that a prolonged examination will be required. In particular, the documents dealing with Nissan's product design and testing will be central to the analysis in determining whether the Pathfinder's seatbelt design was negligent. Further, an examination of the factual assumptions and scientific literature underlying the experts' reports will be key to the trier of fact's assessment of their opinions. These opinions are key evidence that the trier of fact will use to determine issues, like the manner in which the plaintiff was wearing (or not wearing) his seatbelt at the time of the Collision, which will be critical in determining the liability of various parties.

Will the issues require a scientific investigation?

Nissan's Position

[35] Nissan submits that the issues in this case will require extensive, detailed, and highly technical scientific examination. As noted above, at the time of this application, 100 expert reports had been served from 55 different experts. In its written submissions, Nissan listed the following contested issues in the expert reports requiring extensive scientific investigation at trial:

- a) the nature and interpretation of the Pathfinder's EDR data;
- b) the competing accident reconstruction analyses, including the reliability and accuracy of the experts' mathematical modelling and analysis respecting the Delta-V (change of speed) of the Pathfinder in the Collision;
- c) the competing forensic engineering examinations and analyses of the physical evidence, including the Pathfinder and seatbelt, and the scientific literature on which those competing opinions are based;
- d) the methodology, validity, and reliability of competing occupant kinematic and injury biomechanics analyses, including:
 - i. the physics and forces generated during the Collision and how such physics and forces caused the plaintiff's injuries;
 - ii. the methodology, validity, and reliability of the MADYMO computer modelling analysis performed by Nissan's expert Dr. Bain; and
 - iii. the methodology, validity, and reliability of the NASS statistical analysis performed by Nissan's expert Dr. Bain;
- e) the methodology, validity, and reliability of the competing medical, radiology, and injury biomechanics opinions based on the physical injuries and markings on the plaintiff subsequent to the Collision, including the following:
 - i. the nature and type of the medical imaging of the plaintiff's injuries post-collision;
 - ii. the methodology, validity, and reliability of the 3D computer rendering performed by Nissan's expert Dr. Day based on the plaintiff's medical imaging; and
 - iii. the methodology, validity, and reliability of Dr. Day's analysis and opinion that the plaintiff was not wearing his lap belt based on the medical imaging;
- f) the methodology, validity, and reliability of competing surrogate studies and analyses respecting the plaintiff's asserted seatbelt use, fit, configuration, and performance;
- g) the state of knowledge, validity, and reliability of scientific studies and literature respecting the asserted risks of child occupant misuse of seatbelts related to seatbelt design and fit;

- h) the scientific principles and engineering standards and regulations relating to motor vehicle and motor vehicle seat restraint design, performance and safety, including the following:
 - i. the government technical and engineering safety regulations and standards applicable to the design and manufacture of seatbelts;
 - ii. the design, engineering, prevalence, and performance of "comfort guides"; and
 - iii. the design, engineering, prevalence, and performance of rear seat pretensioners;
 - i) the competing human factors and warnings analyses and opinions relating to vehicle operator and occupant behaviours, including the scientific and psychology principles relating to operator and occupant behaviours;
 - j) the medical diagnosis and prognosis of the plaintiff's injuries and condition; and
 - k) the methodology, validity, and reliability of epidemiological data and studies relating to life expectancy of quadriplegics.
- [36] Nissan submits that the jury will be required to understand the specialties of the competing experts and the nature and methodology of their tests and analyses in order to weight the validity and reliability of their opinions. Key disputes among the experts relate to scientific literature upon which they base their opinions, particularly with respect to knowledge of the risk of child-occupant seatbelt misuse and the effectiveness of comfort guides and pretensioners in increasing occupant safety at the relevant times. The experts also conflict with respect to the methodology and merit of the testing and analyses performed, which necessarily engages a scientific investigation.

The Plaintiff's Position

- [37] The plaintiff does not appear to dispute that the issues in this trial require scientific investigation. His submissions focus on the jury's ability to conduct these examinations with the assistance of the experts and skilled counsel doing their job. I will consider these submissions in the following section with respect to the question of whether the investigation can be made conveniently with a jury.

Analysis

- [38] I accept that this trial will require extensive scientific examination. The list of scientific issues prepared by Nissan is an accurate representation of the extent of scientific inquiry that the trier of fact will have to undertake in this case. Not only are the factual assumptions and documents that the expert opinions rely on in dispute, the methodologies used by various experts are also contested. The trier of fact will need to compare the factual assumptions with the actual facts proved and then determine the weight to be given to the various opinions. I find, on the evidence presented to me, that this trial will require significant scientific investigation.

Can the issues requiring prolonged examination of documents and scientific investigation be made conveniently with a jury?

Nissan's Position

[39] Nissan submits that a proper, meaning fair, trial cannot be achieved with a jury in this case. It is not reasonable to expect a jury to retain the voluminous, complex information it will receive in a manner that will allow it to fairly investigate and consider the issues raised. It relies on the following statement from Holmes J., as she then was, in *Steinebach v. Fraser Health Authority*, 2009 BCSC 1577 at para. 23:

It is neither reasonable nor practicable to expect a jury to determine a series of challenging issues based on weeks of complex oral testimony, much of it expert evidence, and voluminous written expert reports. The case authorities note the challenges to a jury of retaining through a lengthy trial its understanding and impression of the evidence. The realities of the single and usually continuous process of deliberation would, in a case such as this, increase the challenges and would, in my view, place an unreasonable burden on the members of the public who serve.

[40] In particular, Nissan says that the case cannot be conveniently tried by a jury because:

- a) the jury will have to weigh and assess the credibility, demeanour, and reliability of 55 expert witnesses and 25-50 fact witnesses on key issues months apart;
- b) the jury will need to determine whether the parties have proven the factual assumptions and documents relied upon by the experts and, if not proven, the appropriate reduction in weight to be given to the specific expert's report;
- c) despite the responsibility of experts and counsel to simplify and explain technical terms and concepts, the number and nature of technical issues in this case means that there is a risk the jury may not understand or retain the understanding of technical terms and concepts, which could lead to inappropriate weight being given to experts;
- d) the complexity of the evidence and the law in this case will make charging the jury particularly difficult, especially on a condensed time frame with the number of complicated and novel issues;
- e) even with perfect instructions, it is unreasonable to expect a jury to fairly analyze the evidence, find the necessary facts, draw the necessary inferences, and reach conclusions on all of the issues in the case within a reasonable period of time without derogating from their duty to the parties;
- f) there will be numerous voir dieres dealing with expert reports, admissibility of documents, and determinations of legal issues which will interrupt the continuous narrative of the trial;
- g) the number of documents entered as exhibits cannot be conveniently managed, transported to and from the courtroom, stored, or reviewed for the jury; and

- h) the scheduling of experts and other witnesses, many of whom are not from British Columbia, will be greatly hampered and constrained in a jury trial.
- [41] Nissan submits that there is a real danger that the jury will become lost in the volume and complexity of the expert evidence and will rush to a premature decision without giving proper consideration to all of the evidence and issues. While it could be that each report, considered on its own, might be understood by a jury with the assistance of the expert's testimony, a retention of all of this information, including the fine detail, over a protracted period, is likely to be so difficult that a proper analysis will be impossible.

The Plaintiff's Position

- [42] The plaintiff submits that a prolonged examination of documents or scientific investigation can conveniently be done with a jury in this case. The fact that there are multiple, competing experts does not create a presumption that the jury cannot conveniently assess their evidence.
- [43] He submits that the role of counsel and experts is to explain difficult concepts in a simple manner that is easy for the jury to digest. Experts are able to provide ready-made inferences for the jury such that it is unnecessary to go into detail with respect to the raw data and more technical elements of their analysis. He points to examples in the expert reports involving diagrams and images to assist the reader.
- [44] The plaintiff submits that several issues, such as automotive industry standards and Nissan's knowledge thereof, can be decided without the assistance of experts using non-technical articles and communications. Further, the issues that do require expert evidence are similar to those routinely undertaken by juries in motor vehicle litigation.

Analysis

- [45] I accept that the prolonged examination of documents and scientific inquiry required to resolve the issues in this case cannot be made conveniently with a jury. The case law is clear that the question of "convenience" is a question of what is required to have a proper trial: Rados BCSC at para. 36. It is a question of the jury's ability not only to understand the evidence, but to retain the understanding throughout the entire trial in a form that permits it to conduct a meaningful analysis of the evidence in relation to the questions which must be decided at the end of the case: Salehi v. Chu, 2014 BCSC 2275 at paras. 7-9; Adamson v. Charity, 2006 BCSC 1642 at para. 10.
- [46] In my view, there is a real risk that the parties will not be able to have a fair trial with a jury. As I have canvassed above, the document evidence and the scientific inquiries in this case are extensive, overlapping, technical, and complex. They go to the heart of the allegations of negligence in this case, and to the parties' ability to defend them. It would be unrealistic to expect even highly intelligent, thoughtful jurors, with capable and articulate counsel and experts, to retain the evidence that will be presented at this trial over the course of several

months in a manner that would permit meaningful deliberation on the issues.

[47] This concern is magnified in this case given the issues with respect to expert evidence. I do not accept the plaintiff's suggestion that it will be unnecessary for the jury to consider the data and methodology behind the reports and to merely accept the ready-made inferences on complex subjects presented to them. The data and methodology of the reports themselves are highly contested among the different experts and will need to be assessed by the trier of fact in deciding whether to accept and how to weigh the competing opinions presented. Even with simplified language and visual aids, the fact that there are layers of intricate scientific issues that are vital to the trier of fact's ability to make the key findings of fact in this case leads me to the conclusion that this is not a case which could be conveniently tried by a jury, as that word has been defined in the case law.

[48] I am concerned that the jury will become lost in the volume and complexity of the expert evidence and in the end will face an insurmountable hurdle to try to grapple with this evidence at the end of many months of trial. Justice Willcock's comment in *Wallman v. ICBC*, 2012 BCSC 1849 at para. 57, *aff'd* 2013 BCCA 409 best captures this concern:

The issues will also require careful consideration of scientific evidence by the jury. In my view, that scientific investigation cannot conveniently be undertaken by a jury. The trier of fact in this case, as in *Gulamani*, will have to consider evidence going to many issues over a protracted period. It may be necessary to retain fine detail from the examination in chief and cross-examination of many witnesses on multiple issues for weeks before those issues are traversed by defence witnesses. Considered on their own, most, but not all, of the expert reports in this case may be understood by a jury in light of the full examination in chief and cross-examination of the experts, but retention of that understanding over several weeks is likely to be so difficult, in my view, that fruitful analysis at the end of the day may be impossible.

[49] This concern is compounded by the length of the trial, which is currently scheduled for 73 days. In my view, this is an unrealistic estimate if this matter is heard with a jury. It may also be an unrealistic estimate if heard by judge alone. The current estimates for witnesses in the trial briefs already amount to well over 100 days of court time, even without including time for jury selection, charge, and deliberation; the numerous expected voir dieres; and extensive read-ins from discovery transcripts.

[50] I am satisfied that the prolonged examination of documents and the scientific inquiries required to resolve the issues in this case are of such a nature that it would be impractical and unfair to try this case with a jury.

Are the issues of an intricate or complex nature?

Nissan's Position

- [51] Nissan submits that the issues in this case are numerous, complex, intricate, and subtle. In particular, it points to: the number of defendants in this case, the different standards of care that apply to each of them (including to each of the Nissan defendants) and whether they were breached, the competing inferences to be drawn from the evidence with respect to the position of the plaintiff's lap belt at the time of the Collision, whether alternative seatbelt designs would have prevented or reduced the injuries and whether the plaintiff would have used them, whether there was a duty to warn and if a warning would have modified the plaintiff's behaviour, the apportionment of fault among the various defendants, and the competing medical prognoses respecting the plaintiff's estimate life span, among others. In total, Nissan's counsel identify 53 factual and legal issues to be resolved at trial.
- [52] Nissan submits that the number, nature, type, novelty, complexity, and inter-related nature of the issues, viewed globally, strongly support this case being tried by judge alone. It says that permitting the trial of this action to proceed before a jury would do an injustice both to the parties, and to the jury burdened with the task of trying to hear and render a verdict in a case of this magnitude and complexity.

The Plaintiff's Position

- [53] The plaintiff submits that the issues in this case are of a character that a jury can understand, retain, and analyze through the length of the trial. Several of the claims are routine motor vehicle accident claims of a sort that B.C. juries are regularly tasked with assessing. The social host and product liability claims can be explained in a manner that need not be overly complex, and can be assisted by the use of visuals.
- [54] The plaintiff submits that Nissan has not articulated why the jury will have difficulty understanding, analyzing, and retaining the issues raised in this case. It is the role of counsel and the judge to simplify the evidence for the jury and to restrict the amount of documentary evidence presented to it. He submits that the volume of document and expert evidence presented by Nissan is a trial tactic that ought not to be used to deprive the opposing party to its fundamental right to a trial by jury. He further says that the complexity presented by Nissan is an illusion presented to avoid a jury trial.

Analysis

- [55] In *Andersen v. Porter et al.*, 2000 BCSC 1000 at para. 14, Wilson J. compiled the following qualitative and quantitative factors that may indicate intricate or complex issues:
1. Multiplicity of parties
 2. Duration of trial
 3. Volume of expert testimony

4. Multiplicity of standards of care
5. The use of unfamiliar medical terms
6. Apportionment of fault
7. The assessment of future loss
8. Novel applications of the law
9. Deliberation time
10. Preservation of the civil jury system

[Citations omitted.]

[56] While the presence of some of these factors in isolation may not be enough to raise a sufficient concern over intricacy or complexity, courts must be attentive to the difficulties arising from the interaction of the issues in assessing the complexity of the case. The inquiry with respect to complexity was thoughtfully explained in *Rados BCSC* at para. 34:

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. 18. 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.

[57] I am satisfied that this is a case of a sufficiently intricate and complex nature that it should not be tried by a jury. While I accept that certain aspects of the Action are of the nature routinely decided by civil juries, there are also aspects of this case that are highly complex, both legally and factually, which make them unsuitable to be tried by a jury.

[58] I agree with Nissan's submission that the number of defendants in this case and the various duties and standards of care that apply to each of them, including with respect to each of the different Nissan Defendants, would be very difficult for a jury to keep track of. Further, the analysis with respect to certain of the plaintiff's product liability claims involve nuanced concepts with respect to risk and alternative realities which, when considered in combination with the complex factual inferences that must be drawn in this case, are not manageable for a jury to handle, even when considering the high level of intelligence and

thoughtfulness juries are presumed to possess. As noted by Justice Verhoeven in another product liability case, *Skretting Canada Inc. v. Westaqua Commodity Canada Group Ltd.*, 2010 BCSC 1614 at para. 77:

In a case like this it can be difficult enough for a judge sitting alone to properly instruct himself or herself as to the law applicable to the decision to be made. A judge sitting alone is able first to determine the real and necessary issues of fact and law applicable to the case. However, a judge sitting with a jury must charge the jury on one occasion on all of the law that may be applicable, depending upon what view of the numerous issues the jury may take. In this case, there is such a multiplicity of issues that the task of a judge in charging the jury would be all but impossible. In turn, the task of the jury would be overwhelming. Moreover, since the jury gives no reasons for its decision, no matter the result there is likely to be a difficult appeal.

- [59] Virtually all of the factors that the case law has identified as being indicative of a complex and intricate trial that is unsuitable for a jury are present in this case. Even if they would not be sufficient on their own to warrant striking the jury notice, it is clear that the cumulative effect of these circumstances is such that it would be unjust for both the jury and the parties not to exercise my discretion to have this trial proceed by judge alone.
- [60] I have been judicially managing these Actions for over two-and-a-half years and in that capacity, based on the judicial management conferences and applications I have presided over, the insights I have obtained further support my view that it is in the interest of justice that the jury be discharged so that a proper trial can take place.
- [61] I disagree with the plaintiff's submission that the complexity of this case is an illusion or a trial tactic concocted by Nissan's counsel. The nature of the evidence relating to the circumstances of the Collision and the legal claims the plaintiff put forward against the various defendants require complex evidence and nuanced factual and legal analyses both to prove and to defend. It is the duty of counsel on both sides to put forward the strongest case possible for their client and to test their opponent's case to the best of their ability. Neither can, or should be, faulted for doing so.

Exercise of discretion

- [62] My analysis of the grounds identified in Rule 12-6(5) for striking a jury notice, both individually and cumulatively, leads to the clear conclusion that this is a case which cannot reasonably or fairly be tried by a jury. I therefore exercise my discretion to proceed by judge alone.
- [63] In addition to the parameters on the exercise of discretion outlined in the Rule (particularly with respect to "convenience" in paragraph (i)), the case law has recognized several additional factors that courts may wish to take into account. The following were outlined by Fitch J. (as he then was) in *Rados* BCSC at para. 38:

- 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 the issues.

[64] These factors are similar to those that were outlined in Andersen as being indicative of an intricate or complex nature. As I said above, virtually every factor listed weighs in favour of exercising my discretion to have this trial proceed by judge alone.

[65] Counsel has estimated that between five and ten days will be occupied by voir dires to hear the parties' objections to over 50 of the expert reports. Again, I am of the view that this time estimate is optimistic. Further voir dires will need to be held to determine the admissibility of documents that the parties, particularly the plaintiff, will seek to rely on, and to determine the use to which the jury can put the documents. The jury will not hear this trial in an uninterrupted manner, but in a protracted manner with frequent intermissions for voir dires and time for the trial judge to consider and rule on them.

[66] The practical reality of managing and deciding these issues in a jury trial is a further reason for me to exercise my discretion to proceed by judge alone.

[67] I am convinced that even the best efforts of counsel, the experts, and myself as the trial judge to explain the factual and legal issues in as clear and simple a manner as possible will not be sufficient to remedy the risk that this case will not be fairly decided by a jury. The words of Chief Justice McEachern in *Wipfli v. Britten*, [1982] 32 B.C.L.R. 343 (S.C.) at 349, aptly apply to the complex issues in the Actions: "This case cries out for unhurried and thoughtful consideration. There must be a weighing of alternatives, and an opportunity to reflect upon these alternatives."

[68] As Fitch J. recognized in *Rados* BCSC at para. 32, there are limits to the ability of juries, even informed and intelligent ones, to try a case:

Simply put, some cases raise subtle, complex, and controversial issues, the nature and magnitude of which are such that the trial cannot conveniently or fairly be heard by a jury.

[69] I find that this case as a whole is too complex to proceed before a jury, and I exercise my discretion to proceed as judge alone.

Conclusion

[70] I order that the trial of this action be heard by the court without a jury on the grounds that the issues require prolonged examination of documents and scientific investigation that cannot be conveniently made with a jury, and the issues are of an intricate or complex character.

[71] The costs of this application will be to the Nissan and Rattan defendants in the cause.

"Forth J."

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