

CANADA / JUDGMENT

Vacchiano v. Chen

2020 BCSC 1035

COURT

Supreme Court of British Columbia

DECIDED

10 July 2020

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2020 BCSC 1035 Vacchiano v. Chen IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Vacchiano v. Chen, 2020 BCSC 1035 Date: 20200710 Docket: M171268 Registry: Vancouver Between: Saveria Vacchiano Plaintiff And Ying Chen, Bok Soon Park and Honda Canada Finance Inc. Defendants Before: Master Muir Reasons for Judgment Counsel for the Plaintiff: D.T. Brown Counsel for the Defendant, Ying Chen: E.K. Haupt Written Submissions received: July 9, 2020 Place and Date of Judgment: Vancouver, B.C. July 10, 2020

introduction

- [1] These are cross applications made by written submissions in accordance with COVID-19 Notices Nos. 14 and 25.
- [2] The application by the plaintiff is for leave to extend the time to apply to strike the notice requiring trial by jury filed by the defendants on March 11, 2019 and for an order striking the said jury notice.
- [3] The cross application is by the defendant, Ying Chen, seeking an order that the trial be adjourned so that his right to a jury trial may be preserved.
- [4] The other defendants, Bok Soon Park and Honda Canada Finance Inc., conceded at the trial management conference that they were prepared to proceed by judge alone and they take no position before me.
- [5] The trial is presently scheduled to proceed on July 20, 2020 for ten days by judge and jury.

Background

- [6] The plaintiff is a 52-year-old woman who was allegedly injured in a motor vehicle collision on December 25, 2015.
- [7] The defendants deny liability.
- [8] The plaintiff has been assessed by many experts and the evidence includes:
 - a) Report by Dr. Tim Kostamo, orthopedic surgeon, dated April 4, 2019.

- b) Report by Dr. John Pullyblank, psychologist, dated April 24, 2020.
 - c) Report of Ashea Neil, functional capacity evaluator, dated April 16, 2020.
 - d) Report of Dr. Frank Canderle, family physician, dated April 22, 2020.
- [9] I am told that the experts for the plaintiff have opined as follows:
- a) Dr. Kostamo concludes the plaintiff has:
 - i. post-traumatic pre-patellar bursitis resulting in knee pain, persistent functional loss and persistent pain, with a poor prognosis for full or further recovery; ii. injury to her Achilles tendon; and iii. lumbar strain and a neck injury.
 - b) Dr. Pullyblank concludes the plaintiff has:
 - i. major depressive disorder; ii. somatic symptom disorder; and iii. post-traumatic stress disorder.
- [10] I am advised that Dr. Kostamo describes the plaintiff as having persistent functional loss and persistent pain. He describes her prospects for full or further recovery as "poor".
- [11] I am told that it is Dr. Pullyblank's opinion that the plaintiff is experiencing clinical levels of anxiety associated with the effects of the collision, including pain, poor finances, and uncertainty about her future.
- [12] The plaintiff has also attended medical examinations with a physiatrist, Dr. Emily Tam, and a psychiatrist, Dr. Mitchell Spivak, at the request of Ying Chen. Reports from those examinations have not been served.
- [13] The plaintiff worked for the B.C. Ministry of Child and Family Services until July 2016 when she alleges she had to stop due to her injuries and ongoing pain. She apparently has not worked since that time.
- [14] The claim was commenced in 2017. All examinations for discovery were completed in 2019.
- [15] A notice of trial was filed on February 21, 2019 for the trial set for July 20, 2020. All parties filed notices of trial by jury. Covid-19 and the Courts operation
- [16] On March 18, 2020, in response to the COVID-19 pandemic and the provincial state of emergency, the Chief Justice announced: As part of the Court's efforts to prevent the spread of COVID-19, the Chief Justice of the Supreme Court of British Columbia has ordered the suspension of all regular operations, effective immediately and until further notice. It is a constitutional imperative that the courts must remain open; however, in light of the extraordinary circumstances during the current public health emergency, members of the public who do not have urgent business before the court are discouraged from attending any courthouse. Any matter scheduled for an appearance today shall proceed unless the presiding judge orders otherwise. All regular hearings scheduled after today are adjourned indefinitely.

- [17] The courts proceeded to carefully resume operations in a phased way and in the latest release that deals with jury trials: COVID-19: Resumption of Further Court Operations, COVID-19 Notice No. 25, Date: revised June 3, 2020, it was noted: All civil jury selections are suspended and jury trials are cancelled up to and including September 7, 2020 everywhere in the province. Until court registries reopen for in-person services, parties will not be able to submit jury fees. Applications to abridge timelines to pay jury fees will be considered once registries reopen for in-person services. Since resumption of jury selections must precede resumption of jury trials, jury trials may be further delayed. For civil matters where a jury notice has been filed and served, if all parties consent to proceeding by judge alone, they make seek such an order at a TMC or a JMC. A party wishing to strike a jury notice may bring an application through the Application by Written Submissions process set out in COVID-19 Notice #14. A party wishing to oppose an application to strike can respond through the Application by Written Submissions process and request adjournment of the trial. For more information, see COVID-19 Notice #26.
- [18] Thus, it appears that unless all parties agree to proceed by judge alone, the trial is cancelled. The application for an adjournment in the circumstances seems unnecessary.
- [19] The issue thus becomes whether the jury notice should be struck, allowing the trial to proceed in July. If it is not, my review of the website for trial scheduling indicates that there are presently only two dates available for ten-day trials. Both are in January 2022. Legal Basis Leave to Extend the Time to Apply
- [20] There has been such an obvious change in circumstances since the parties elected to proceed to trial by judge and jury that little authority is required to persuade me that an extension of time is appropriate.
- [21] To the extent that authority is required, Mr. Justice Willcock (as he then was) noted in *Wallman v. Insurance Corporation of British Columbia*, 2012 BCSC 1849:
- [38] The parties acknowledge that it is the original jury notice that must be considered in determining whether the application to strike the jury is brought in time. Where that time has passed, the judicial discretion to extend time limits afforded in what is now Rule 22-4, formally Rule 3(2), should be exercised where:
- (c) trial fairness so requires reconsideration of the mode of trial that the lapse of time cannot bar the motion to strike.
- [22] I conclude that is the case here, and I grant the application for extension of time to apply to strike the jury notice. Application to Strike the Jury Notice
- [23] Rule 12-6(5) of the Supreme Court Civil Rules [Rules] allows a party to apply to have a matter heard by judge alone: 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,
- [24] Subrule 12-6(5)(a)(iii) is the only one that might be considered to be applicable in the present circumstances.
- [25] In considering that subrule, Justice Silverman noted in *Cotter v. Point Grey Golf and Country Club*, 2015 BCSC 447:
- [21] I am in agreement with the comments of Master Harper concerning the issue of proportionality. I have been told by counsel, and Mr. Cotter apparently was aware of this as well, that ss. (iii) of 12-6(5)(a) is a new section which came into existence when the new Supreme Court Rules, just a few years ago, came into existence. Subsection (i) and (ii) pre-existed. Now, ss. (iii) has been added to it. That is not surprising because of the overarching Rule concerning proportionality which is one of the hallmarks of the new Rules and I will read that, Rule 1-3: Object
- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Proportionality
 - (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
 - (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.
- [22] In my view, it is not unimportant that 12-6(5)(a)(iii) uses the word "disproportionate". It is one of the few Supreme Court Rules which refers to "proportionality" in addition to the overarching Rule which I have just read. I am satisfied that that is, at least in part, because jury trials are expensive not only for the litigants and for the court system, but for the members of the public who give their time to come to the courthouse and serve.
- [26] In *Cheung v. Dhaliwal*, 2020 BCSC 911, Master Vos considered a similar, though perhaps less compelling, factual circumstance to that before me and ordered the jury notice in that action struck under subrule 12-6(5)(a)(iii).

Analysis

- [27] The Rules were not formulated with a pandemic in mind. They must be looked at in a purposive manner in the present circumstances.
- [28] The purpose must be consistent with the ultimate object of the rules of a "just, speedy and inexpensive determination of a proceeding on its merits". The analysis seems to me to be similar to many others the court embarks on, and incorporates factors of balancing prejudice to achieve a just result.
- [29] Although not a "right" (see, e.g., *Waymark v. Barnes* (1995), 3 B.C.L.R. (3d) 354 (C.A) and *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324), the importance of the availability of a jury trial in civil cases has been echoed in many decisions in our courts.
- [30] The importance of a jury to a defendant, however, cannot and does not outweigh all other considerations.
- [31] Looking at the strict wording of subrule 12-6(5)(a)(iii), the extra time and cost here involves likely at least a two-year adjournment, additional costs for updated expert examinations and reports, and additional examinations for discovery. That trial may well be conducted under new rules for expert reports, which could prejudice the plaintiff in that she would be unable to recover costs for some of the experts she presently relies upon.
- [32] As the defendants deny liability, a two-year delay for a trial involving a motor vehicle collision that is already five years in the past runs the obvious risk of decaying memories. Thus, a two-year delay runs the risk of affecting the ability of the parties to have a "just" proceeding on the merits.
- [33] I also note that the psychological and financial condition of the plaintiff indicates that a significant "cost" might be inflicted upon her by such a delay.
- [34] Although it is argued that the amount involved here is substantial given the amount of time that the plaintiff has been off work, in my view, that is outweighed by the additional time and cost of awaiting a jury trial. decision
- [35] The application to strike the jury notice is granted and the application for an adjournment of the trial set for July 20, 2020 is denied. costs
- [36] The plaintiff will have her costs of both applications in the cause. "Master Muir"

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